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In The Supreme Court of the United States

ROLAND V. ASKINS, JR., Individually and as Trustee of RVA Trust,

Petitioner,

v.

COUNTY OF WILLIAMSBURG, SOUTH CAROLINA, and J. WILLIAM HANNA, WILLIAM L. FULMORE, MARGARET C. McALISTER LYNCH, RICHARD F. BURCH, and C.B. ASKINS,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

PETITION FOR A WRIT OF CERTIORARI

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91 pp

QUESTION PRESENTED FOR REVIEW

Whether the judgments of the South Carolina courts that there had been an implied dedication of real property owned by the Petitioner solely because there had been no objection to use of the property by the public constituted a taking of the Petitioner's real property for a public use without the compensation required by U.S. Const. amends. V and XIV.

LIST OF PARTIES TO PROCEEDINGS BELOW

The caption of this case contains the names of all parties to the proceedings before the Supreme Court and Court of Appeals of South Carolina.

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U.S. Const. amend. XIV ..... *passim*

OPINIONS BELOW

The order of the Supreme Court of South Carolina denying Petitioner's petition for writ of certiorari to the Court of Appeals of South Carolina is not reported and is set forth in the Appendix at A-1. The opinion of the Court of Appeals of South Carolina in *County of Williamsburg et al. v. Askins*, Unpublished Opinion No. 2000-UP-552 (S.C. Ct. App. Aug. 22, 2000), is not reported and is set forth in the Appendix beginning at A-3. The opinion of the South Carolina Court of Common Pleas of the County of Williamsburg in *County of Williamsburg et al. v. Askins*, No. 96-CP-45-262 (S.C. C.P. Apr. 30, 1999), is not reported and is set forth in the Appendix beginning at A-10.

STATEMENT OF JURISDICTION

The order of the Supreme Court of South Carolina denying the Petitioner's petition for writ of certiorari to the Court of Appeals of South Carolina was denied on March 21, 2001 (A-1). The Court of Appeals of South Carolina entered its judgment on August 22, 2000 (A-3). The Petitioner timely filed a petition for rehearing in the South Carolina Court of Appeals on September 5, 2000, which petition was denied on October 18, 2000. This Court has jurisdiction to review the judgment of the

Court of Appeals of South Carolina under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. V provides as follows:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. XIV, § 1 provides as follows:

> All persons born or naturalized in the United States, and subject to the

jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

S.C. Code Ann. § 27-3-10 (1977) provides as follows:

> The purpose of this chapter is Uiis toourage owners of land to make land and water areas available to the public for recreational purposes by limiting their liability toward persons entering thereon for such purposes.

S.C. Code Ann. § 27-3-20 (1977) provides as follows:

> As used in this chapter:
>
> (a) "*Land*" means land, roads, water, watercourses, private ways and

buildings, structures, and machinery or equipment when attached to the realty.

(b) "*Owner*" means the possessor of a fee interest, a tenant, lessee, occupant or person in control of the premises.

(c) "*Recreational purpose*" includes, but is not limited to, any of the following, or any combination thereof: Hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, waterskiing, summer and winter sports and viewing or enjoying historical, archaeological, scenic, or scientific sites.

(d) "*Charge*" means the admission price or fee asked in return for invitation or permission to enter or go upon the land.

(e) "*Persons*" means individuals regardless of age.

S.C. Code Ann. § 27-3-40 (1977) provides as follows:

Except as specifically recognized by or provided in § 27-3-60, an owner of land who permits without charge any person having sought such permission to use such property for recreational purposes does not thereby:

(a) Extend any assurance that the premises are safe for any purpose.

(b) Confer upon such person the legal status of an invitee or licensee to whom a duty of care is owed.

(c) Assume responsibility for or incur liability for any injury to such person or property caused by an act of omission or such person.

STATEMENT OF THE CASE

This action was brought by the Respondents, Williamsburg County, South Carolina, and residents of the County, on August 12, 1996 for a permanent injunction against the Petitioner to enjoin the Petitioner from blocking, barricading, or restricting access to, from,

or upon a way crossing property held in trust by the RVA Trust. Petitioner is the trustee of the trust and charged with safeguarding the assets of the trust, and the real property has been owned by the Petitioner's family since 1947. The way crossing the real property, commonly known as "Fulmore Road," had been made available for the use of the neighbors of the Petitioner and Petitioner's family as a shortcut between two public roads.

On July 7, 1996, the Petitioner notified the County of his intent to barricade the road. This decision was made after the Petitioner experienced numerous trespasses upon the land, the destruction of trees, and even the burning of his family home in April 1996. This precipitated the Respondents' filing of an action for an injunction to prevent the Petitioner from restricting access along the road.

The parties entered into a stipulation of facts in the trial court, which included the following:

- Fulmore Road is a dirt road of about 1.6 miles in length which intersects two public roads at its eastern and western termini.
- The road passes through the property of the Petitioner and that of Respondent Margaret C. McAlister Lynch.

- No written easement has been granted by landowners in the Petitioner's chain of title.
- Fulmore Road is not identified by that or any other name on any known plat.
- Although the County removed 1.2 acres from the tax assessment of the McAlister property, representing the land encompassing Fulmore Road, the portion of Fulmore Road within the Petitioner's property has not been excluded from the Petitioner's tax assessment.
- Fulmore Road was first shown on a map in 1984 and was designated a county road in 1992.

(A-12, 13.) It also was stipulated that the County had performed work on the road since about 1977, which consisted of occasionally scraping the road and installing a drainage pipe under the road. However, neither Petitioner nor his father, who previously owned the property, ever requested this work or did anything else to lead County officials to conclude that the road was public (A-14).

The trial court also heard evidence from local residents concerning their use of the road. One resident stated that he always uses the road to reach his farming operations and had been familiar with the road for 40

years (A-15). Other persons who currently reside on or near the road stated that the road always has been used and traveled by the public and school buses and that it has been maintained by the County (A-16). However, the trial court also took notice of the fact that the County had for years engaged in the maintenance of private roads, but had ceased this practice after a lawsuit was filed challenging this practice (A-13, 14, 26, 27).

The trial court also found that the County had maintained the road monthly and had twice installed drainage pipes under the road prior to 1978 (A-17). Petitioner's predecessor in title observed the County performing this work (A-17).

Based upon this evidence, the trial court ruled that there had been an implied dedication of the road to public use (A-27).[1] It recognized that the two necessary elements for a dedication of land under South Carolina law are (1) a positive and unmistakable expression by the landowner of an intention to dedicate the property to public use, and (2) an acceptance of such property by the public (A-18). The court found that the first element was satisfied by the widespread public use of the road and the

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[1]The trial court also ruled that an easement by prescription arose (A-9), but this issue was not reached by any court on appeal.

fact that the County had maintained the road (A-22). It ruled that the intent to dedicate required under South Carolina law could be inferred from the listing of the road on maps, the use of the road by the public, the County's maintenance of the road, and the failure of any owner of the Petitioner's property to object to the County maintenance (A-22). That the Petitioner and his predecessors paid taxes on the road was deemed relevant to the question of dedication, but not dispositive against a dedication (A-23).

The Petitioner timely appealed this ruling, which was affirmed by the South Carolina Court of Appeals (A-9). The Court of Appeals also recognized that state law places the burden upon the party asserting a dedication to show that the owner expressed in a positive and unmistakable manner the intention to dedicate the land to public use and an acceptance of that dedication (A-7). Nonetheless, the court found that the Petitioner and his "predecessors' acquiescence in the public's long and continued use of the road establishes their intent to dedicate Fulmore Road to the public" (A-9).

A petition for rehearing was filed with the Court of Appeals in which the Petitioner argued that the Court had departed from state precedent on the dedication of property and that this effected a taking of the Petitioner's property for public use without compensation in

violation of U.S. Const. amends. V and XIV (A-51). Dedication had never previously been found on the basis of permissive public use, but, instead, South Carolina law requires a "positive and unmistakable" indication of an intent to dedicate (A-58). The request for rehearing also pointed out that South Carolina's recreation use statute, which encourages property owners to allow the public to use private property, further indicates that mere acquiescence is not enough to establish a dedication (A-57). The petition for rehearing was not granted.

A petition for writ of certiorari was timely filed with the South Carolina Supreme Court. That petition also raised the claim that a determination that Fulmore Road had been dedicated to the public under the facts of this case constituted an unlawful taking of property without just compensation in violation of the Fifth and Fourteenth Amendments (A-44, 45). The Petitioner argued to the South Carolina Supreme Court that the decisions below were contrary to precedent on public dedication. The effect of this departure was to change what had previously been the Petitioner's private property into public property in violation of the prohibition on taking without just compensation (A-45). In an order dated March 21, 2001, the South Carolina Supreme Court denied the petition for writ of certiorari (A-1).

ARGUMENT

There can be little doubt that the kind of interference with the Petitioner's property interests which arose because of the state court decisions is the kind of interference which constitutes a "taking" for the purposes of the Fifth Amendment's Just Compensation Clause. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), this Court had little difficulty in determining that a landowner's property would be taken if the government required that the owner make an easement available across his property for use by the public in reaching a beach. The *Nollan* decision pointed out that it has been repeatedly held that the right to exclude others from property is one of the most essential "sticks" in the bundle of rights which accompany property ownership, and so an interference with that right constitutes a taking of property. *Id.* at 831 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)). *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994), expanded upon the ruling in *Nollan* and held that a forced dedication of land for public use similarly deprives a landowner of an essential right flowing from property ownership and is a taking for purposes of the Fifth Amendment. The Fifth Amendment's requirement that no taking of private property occur except upon just compensation to the owner is applicable to the several states through the

Fourteenth Amendment. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978).

The instant case is even more clearly one where a taking has occurred because, unlike *Nollan* and *Dolan*, the state government has not merely required dedication of property to public use a condition upon developing the property. Under the court decisions below, the Petitioner is required to allow access over his land and the use of his land without receiving anything in return. Requiring the Petitioner to involuntarily dedicate the Fulmore Road property to the public is unquestionably the kind of forced deprivation of the property right to exclude others, which is covered by the requirement of just compensation imposed by the Fifth Amendment.

It does not matter for the purposes of that constitutional provision that the exaction was made by the state judiciary as opposed to some other arm of the government of South Carolina. "[A] State, by *ipse dixit*, may not transform private property into public property without compensation[.]" *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). *Beckwith* ruled that neither a state legislature, "nor the [state] courts by judicial decree," may recharacterize property interests in such a way as to deprive a person of a property right which had previously existed. "Moreover, the

government does not have unlimited power to redefine property rights." *Loretto*, 458 U.S. at 439.

A change or departure from the common law by a court which deprives a landowner of a right which previously attached to the property under the common law works a taking of that property right just as a statutory change effected by the legislature would. In *Lucas v. South Carolina Coastal Commission*, 505 U.S. 1003, 1030-31 (1992), this Court held that whether a "total taking" of property occurs by virtue of regulations restricting development must be determined with reference to the common law and whether the proposed use of the property could have been restricted as a matter under those principles. Citing *Beckwith*, the *Lucas* decision stressed that if the common law would not have prevented the development desired by the landowner as a nuisance, then a restriction upon that development must be considered a taking of the landowner's property for which compensation must be paid. The state may not, by *ipse dixit*, simply transform what theretofore has been a private property right into a public right. 505 U.S. at 1031; *see also Phillips v. Washington Legal Foundation*, 524 U.S. 156, 167-69 (1998) (the state of the common law prior to a court decision or other law which impinges upon property interests is important in determining whether there has been a taking of property).

The imposition of a public road traversing the Petitioner's land under the decrees of the South Carolina Courts effected precisely the kind of departure from the common law of implied dedication which is considered a taking of property under *Lucas* and *Beckwith*. One of the Petitioner's inalienable property rights includes the power to exclude others from the property. By requiring, against the Petitioner's will, that the land be dedicated to public use and that others be allowed to cross over his land, the state courts have taken that property right from the Petitioner. *Dolan*, 512 U.S. at 384. To the extent the background principles of property law do not recognize that a dedication of a public road would occur under the facts and circumstances of this case, the South Carolina courts' decision to depart from those laws is a taking without compensation for the purposes of the Fifth Amendment. *Lucas*, 505 U.S. at 1031.

Prior to the decision in this case, South Carolina imposed a rigorous burden upon those, like the Respondents, who claimed that there had been an implied dedication of property for public use. "Since we know that individual owners of property are not apt to transfer it to the community or subject it to public servitude without compensation, the burden of proof to establish dedication is upon the party claiming it." *Anderson v. Town of Hemingway*, 269 S.C. 351, 237 S.E.2d 489, 490 (1977). A line of South Carolina authority also

has held that one who asserts a dedication must demonstrate conduct on the part of the landowner which clearly, convincingly, and unequivocally indicates the landowner's intention to create a right in the public. 237 S.E.2d at 490; *Derby Heights, Inc. v. Gantt Water & Sewer District*, 237 S.C. 144, 116 S.E.2d 13, 16 (1960); *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699, 702 (1952).

In *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 126 (Ct. App. 1995), the court set forth the elements of dedication as follows:

> Dedication requires two elements. First, the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993). Second, there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication. *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992).

At issue in the instant case is the first element and whether the Petitioner or his predecessors in title ever exhibited the kind of clear and unmistakable intention to dedicate the contested property to public use. In finding such intention, the courts below relied primarily upon the

fact that the Petitioner and his predecessors had allowed the public to use Fulmore Road without objection (A-9, 21). The Court of Appeals wrote that "[w]e find the [Petitioner's] and [his] predecessors' acquiescence in the public's long and continued use of the road establishes their intent to dedicate Fulmore Road to the public" (A-9).

But this ruling that mere acquiescence by Petitioner and his predecessors in the use of the road is enough to demonstrate intent to dedicate is a clear departure from state common law on implied dedication. In *Cleland v. Westvaco Corp.*, 314 S.C. 508, 431 S.E.2d 264, 266 (Ct. App. 1993), the court rejected the idea that evidence showing that various members of the public had traversed the defendant's land for over 50 years as a road to reach an area along a river even created a jury issue on the question of whether the defendant had intended to dedicate the land to public use. The court emphasized that "dedication is an exceptional mode of passing an interest in land" and that the proof must be consistent only with the conclusion that there was an intent to dedicate the land, and wrote that the acts the plaintiff relied upon, "that is, the long-term public recreational use of the road to reach Mose Landing, were not sufficient to establish implied dedication." 431 S.E.2d at 266.

To the same effect is the decision in *Shia* in which a landowner sought to prevent a neighbor from crossing

his land, and the neighbor responded by asserting that the alley he was using had been dedicated to the public as a way of travel. In support of this claim, the neighbor claimed that an intention to dedicate the land was shown by the fact that persons had been permitted to use the land to drive to the neighbor's rear door for over 20 years. Reversing a decision finding that an implied dedication arose, the court wrote as follows:

> From the authorities we have cited, it would seem clear that to create a dedication by implication, the owner of the real estate must have done some act from which a positive intent on his part to dedicate the land to the public can arise. It is elementary law that an intention to dedicate must be plainly manifest. Here, there is no such manifest intention. . . . The fact that the pubic was allowed to use the strip of land under circumstances such as exist here, without objection by the owner, is not sufficient from which to imply a dedication. During all of the time that the public has been permitted to use this driveway now in dispute, the appellant and [her predecessor in title], under whom she claims, have paid the taxes thereon to the City of Florence; and while this of itself is

> not generally treated as very strong evidence, still it is some evidence that they did not intend to dedicate it to the public.

72 S.E.2d at 702; *accord Mack*, 464 S.E.2d at 126 (acts proved to support dedication must not be consistent with any construction other than dedication, and dedication may not be implied from the permissive, sporadic, and recreational use of property).

Thus, prior to the court decisions below, South Carolina law clearly required more than just permissive use of property in order to prove the essential element of intent on the part of the landowner to dedicate the land to public use. As shown by the decision in *Shia*, any indication of such intent is even less compelling when the landowner had consistently paid taxes on the property. The payment of taxes by the Petitioner and his predecessors in title exists in this case (A-23).

The Court of Common Pleas decision indicated that the fact that public authorities had maintained the road and the fact that the Petitioner's predecessors knew of this maintenance were enough to show the intent to dedicate the road,[2] citing *County of Darlington v. Perkins*,

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[2]The subsequent Court of Appeals decision did not rely upon the public maintenance upon Fulmore Road in

269 S.C. 572, 239 S.E.2d 69 (1977). However, *Perkins* is distinguishable because it was stipulated in the instant case that the Respondent County had been in the practice for many years of performing maintenance on private roads (A-13). Thus, the fact that there was public maintenance on Fulmore Road does not show that the road was being treated as a public road. On the crucial issue of the landowner's intent, the fact that one of the Petitioner's predecessors may have known that public maintenance was being conducted on his land does not indicate his intent that the road be treated as a public one since other private roads in the County received the same treatment. The *Perkins* decision also did not have the added element of the payment of taxes on the property by the landowner, and in that case the deed to the property specifically reserved a right of way to the road.

The instant case also must be considered in light of the provisions of South Carolina's Limitation on Liability of Landowners Act, S.C. Code Ann. §§ 27-3-10 et seq. (1977). Under that Act, landowners are encouraged to make land and water areas available to the public free of charge in return for a limited immunity from liability. *Id.* § 27-3-60. A "recreational purpose" is broadly defined to

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determining that there had been an implied dedication of the property.

include various activities, including "pleasure driving." *Id.* § 27-3-20(c). The Act certainly contains no indication that a landowner will be deemed to have dedicated his property to the public if he or she does as it encourages. The Petitioner and his predecessors, in accord with this encouragement and public policy of the State of South Carolina, allowed others to use their property for driving, and their decision to do as the state has encouraged should not be considered evidence of an intent to dedicate the property to public use.

In light of the background principles of the common law, it is plain that the decisions in the instant case constitute a drastic departure from the law. The effect of that departure is to deprive the Petitioner of his right to exclude others from the property. This deprivation has occurred not based upon the normal extension and application of existing principles but by *ipse dixit*. Under the *Beckwith* decision, the kind of reordering of property rights which has resulted in a transfer of a property interest to the public and for a public benefit constitutes a taking of property without compensation in violation of the Fifth and Fourteenth Amendments. The judgment of the Supreme Court of South Carolina should be reversed to prevent this constitutional transgression.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that a Writ of Certiorari issue to the Supreme Court of South Carolina to review the judgment of the Court in this case and that, after full briefing and review, the judgment below be reversed.

Respectfully submitted,

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Counsel of Record for Petitioner

No. _____

In The Supreme Court of the United States

ROLAND V. ASKINS, JR., Individually and as Trustee of RVA Trust,

Petitioner,

v.

COUNTY OF WILLIAMSBURG, SOUTH CAROLINA, and J. WILLIAM HANNA, WILLIAM L. FULMORE, MARGARET C. McALISTER LYNCH, RICHARD F. BURCH, and C.B. ASKINS,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of South Carolina

APPENDIX

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THE SUPREME COURT OF SOUTH CAROLINA

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March 21, 2001

Stuart W. Snow, Esquire
Dusenbury, Snow & McGee, P.A.
P.O. Box 555
Florence, SC 29503

Re: County of Williamsburg v. Askins, Roland
1996-CP-45-262

Dear Counsel:

The Court has issued the following order on your Petition for Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied.

s/ Jean H. Toal C.J.
For the Court

March 21, 2001."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

s/_____

CLERK

DES/dmh

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch, and C.B. Askins,

Respondents,

v.

Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, and Buddy Platt,

Defendants,

of whom Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, is,

Appellant.

Appeal From Williamsburg County
M. Duane Shuler, Circuit Court Judge

Unpublished Opinion No. 2000-UP-552
Heard June 6, 2000 - Filed August 22, 2000

COUNTY OF WILLIAMSBURG v. ASKINS

AFFIRMED

Stuart W. Snow, of Dusenbury, Snow & McGee, of Florence, for appellant.

William E. Jenkinson, III, and Jennifer R. Kellahan, both of Jenkinson & Jenkinson, of Kingstree; and E. Leroy Nettles, Jr., of Nettles, Turbeville & Reddeck, of Lake City, for respondents.

PER CURIAM: Williamsburg County, J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch, and C.B. Askins (Respondents) brought an action against Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, and Bobby Platt (Appellants) for a permanent injunction enjoining the Appellants from restricting access in any way on Fulmore Road. The trial court held the Respondents had established a public dedication of Fulmore Road and a public easement by prescription. It permanently enjoined the Appellants

from impeding the right of the public to use the road. The Appellants appeal. We affirm.

FACTS

Fulmore Road is a dirt road approximately 1.6 miles long, which connects two public roads. It has been depicted as an unnamed, unpaved county road on state highway maps published on or after January 1, 1966. In 1992, the road was designated as county road, CR-24-301. Fulmore Road crosses the Appellants' property, the RVA Trust tract, on its eastern end and Respondent Margaret C. McAlister Lynch's property, the McAlister Estate tract, on its western end. The only traffic sign on the road is a stop sign at the intersection with the public road on its eastern end.

On July, 4, 1996, the Appellants erected two barriers blocking Fulmore Road to prevent travel across the RVA Trust tract. They placed signs stating "Road Closed" on the barriers. The County, the owner of the McAlister tract, and several citizens who used Fulmore Road brought this action to enjoin the Appellants from blocking the road.

DISCUSSION

The Appellants argue the trial court erred in holding the Respondents established a public dedication of Fulmore Road.[1] We disagree.

The determination of whether a roadway has been dedicated to the public is an action in equity. *Tyler v. Guerry*, 251 S.C. 120, 160 S.E.2d 889 (1968). As such, we may find facts in accordance with our own view of the preponderance of the evidence. *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976).

Dedication is an exceptional mode of passing an interest in land, and proof of dedication must be strict, cogent, and convincing. *Tupper v. Dorchester County*, 326

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[1]Appellants rely on this court's unpublished opinion, *King v. Poston*, OP. No. 98-UP-435 (S.C. Ct. App. filed Oct. 19, 1998). Rule 239(d)(2), SCACR provides, "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." Furthermore, this court did not address the issue of public dedication in *King*. Instead, we found the appellants had failed to appeal the trial court's ruling that they did not establish public dedication of the road.

S.C. 318, 487 S.E.2d 187 (1997). The party seeking to establish dedication must prove two elements: (1) the owner must express in a positive and unmistakable manner the intention to dedicate his property to public use; (2) there must be, within a reasonable time, an express or implied public acceptance of the property offered for dedication. *Horry County v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993); *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992).

A landowner's intent to dedicate may be implied from allowing lengthy public use of the land. *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 124 (Ct. App. 1995). The acts proved, however, must not be consistent with any construction other than that of a dedication, and dedication may not be implied from the permissive, sporadic, and recreational use of property. *Id.* The record must contain evidence the owner of the property clearly, convincingly, or unequivocally intended to dedicate the property for public use. *Id.*

Acceptance and dedication may be demonstrated by a governmental authority not assessing taxes on the land. *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992). The payment of taxes on disputed

property is evidence contrary to the intent to dedicate property to the public. *Tupper*, 326 S.C. at 327, 487 S.E.2d at 192.

In 1967, the County removed 1.2 acres for the right-of-way from the tax assessment of the McAlister Estate tract. No taxes have been levied or paid upon the 1.2 acre portion since then. The County, however, always assessed and levied taxes on the entire RVA Trust tract.

The individual Respondents submitted affidavits relating their use and their observations of the public's use of Fulmore Road. Willie Fulmore stated that all types of traffic, including school buses, have used Fulmore Road since the late 1920's. The other individual Respondents similarly stated the public had regularly used the road for as long as they had been familiar with it. They complained the Appellants' barricading of the road created problems for them and for all of the residents of the area by interrupting the normal flow of traffic. The Respondents also stated they had witnessed the County maintaining the Road over the years.

Williamsburg County undisputedly has a history of maintaining private roadways for the accommodation

of landowners. Beginning in 1984, a series of circuit court orders prohibited the County from expending public funds and using County equipment and workers on private property. The County, however, continued to maintain Fulmore Road after the issuance of these orders.

The Appellants assert their payment of taxes indicates they and their predecessors did not intend to dedicate the road to the public. The payment of taxes is but one factor to consider when determining the intent to dedicate. We find the Appellants' and their predecessors' acquiescence in the public's long and continued use of the road establishes their intent to dedicate Fulmore Road to the public. We hold the trial court did not err in finding Fulmore Road had been dedicated for public use. Because we affirm the trial court's grant of a permanent injunction based on public dedication, we do not address the Appellants' arguments on the issue of public prescriptive easement.

AFFIRMED.

HEARN, C.J., ANDERSON, and HUFF, JJ., concur.

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	CASE NO.: 96-CP-45-262
COUNTY OF WILLIAMSBURG	)	
	)	
County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch and C. B. Askins,	)	
	)	ORDER
Plaintiffs,	)	
	)	
vs.	)	
	)	
Roland V. Askins, Jr., Individually and As Trustee of RVA Trust and Buddy Platt,	)	
	)	
Defendants.	)	
	)	

This action was brought by the Plaintiff, Williamsburg County, and other Plaintiff citizens of

Williamsburg County for a permanent injunction against the Defendants enjoining them from blocking, barricading or restricting access in any way on Fulmore Road in Williamsburg County. This Court issued a *pendente lite* Order on August 21, 1996 and now comes before the Court upon the merits.

Plaintiff, Williamsburg County, is represented by W. E. Jenkinson, III, Esquire, attorney for Williamsburg County, Kingstree, South Carolina and the remainder of the Plaintiffs by E. LeRoy Nettles, Jr., Esquire of Lake City. Defendants are represented by Stuart W. Snow, Esquire of Dusenberry & Snow, P.A. of Florence, South Carolina.

Plaintiffs asked the Court to declare that Fulmore Road has been dedicated to public use and that a prescriptive easement has been established. Fulmore Road is a county maintained road 1.65 miles in length leading from SC Highway S-45-553 to Jones Road, a county maintained road in the Beulah Woods Section of Ridge Township, Williamsburg County. The Defendants originally blocked access to this road in July of 1996 which resulted in the *pendente lite* Order of this Court.

The parties entered into the following stipulations:

1) "Fulmore" road is a dirt road of approximately 1.6 miles in length, which intersects with S.C. Highway S-45-553 (Beulah Road) on its western end, and Jones Road on its eastern end. Both Beulah Road and Jones Road are public roads.

2) "Fulmore" road traverses through two separate tracts of private property: the RVA Trust tract on the eastern end, and the McAlister Estate tract on the western end.

3) As of 1967, Plaintiff County removed 1.2 acres from the tax assessment of the McAlister Estate tract, representing a right-of-way for a public road across the McAlister Estate tract, and no taxes have been levied or paid upon such 1.2 acre portion by any owner of said tract since that time.

4) No written easement has been granted by a landowner in the chain of title of the RVA Trust property from 1800 to the present.

5) For as long as Plaintiff County has assessed and levied property taxes, Plaintiff County has levied annual property taxes on the entire 191.5 acre RVA Trust Property, including the portion referred to as "Fulmore" road, which have been paid by Defendant Askins and his predecessors in title.

6) "Fulmore" road was first named and identified as such on any known map by J. D. Brockington, a retired Williamsburg County tax assessor, in or about 1984.

7) "Fulmore" road was designated as a county road (CR-24-301) by William Wheeler, under a contract with Alex Chapman, former Williamsburg County Supervisor, in 1992.

8) "Fulmore" road is not identified by that or any other name on any known plat.

9) "Fulmore" road does not have any speed limit, street, or other traffic control signs, other than a stop sign at its intersection with Jones Road; it does not have a stop sign at its intersection with Beulah Road.

10) James Moseley, a motor grader operator employed by Plaintiff County, has scraped "Fulmore" Road since approximately 1977, and installed a drainage pipe under "Fulmore" Road in 1978. Mr. Moseley testified that Defendants nor their predecessors in title never asked him to scrape "Fulmore" road or install any drainage pipe, nor did they do anything to cause him to believe that "Fulmore" road was public.

11) Since 1984, Plaintiff County has been ordered by this Court not to provide public maintenance on private

roads, as is more fully set forth in the October 22, 1984 Order, case #84-CP-45-321; any public maintenance of "Fulmore" road by Plaintiff County after October 22, 1984 was done without any easement or affidavits of prescriptive easements from owners living on the road for more than 20 years.

12) Richard Treme, Williamsburg County Supervisor, testified that there is no evidence of any actions or statements by Defendants or their predecessors in title to the RVA Trust tract which would lead Plaintiffs to believe that "Fulmore" road is public.

13) An unnamed road, depicted as an unpaved road, is depicted traversing the RVA Trust property in State Highway maps published on and after January 1, 1966. There is no depiction of any roadway, public or private, traversing the RVA Trust property in State Highway maps published prior to 1966.

14) Copies of the pleadings and records filed in *King vs. Player*, case #95-CP-45-204, as well as the plats, maps and other exhibits concerning this matter, shall be admissible as exhibits herein, without the necessity of a sponsoring witness.

15) The parties agree that the affidavits previously submitted by the non-county Plaintiffs herein, as well as

the affidavit of Defendant Askins, shall be admissible as if the witnesses had testified at trial herein, subject to the right of either party to depose any such witness within 30 days of the date of trial herein, and that the record shall be left open for the receipt and consideration of such deposition testimony.

In addition to the Stipulations, the parties agreed that this matter would be heard upon arguments of counsel, depositions taken in this case, affidavits submitted, verified pleadings and the exhibits which are attached to the depositions or as agreed upon at the time of hearing. In addition to the Stipulations above, the Court has taken notice of the following findings:

1) A number of citizens including Richard F. Burch, Willie "Buck" Fulmore, James William Hanna, C. B. Askins, Sr., John Benson Rodgers, Zell Gaskin and Margaret C. McAlister Lynch all live near or on the road in question and have submitted Affidavits in this case. Fulmore Road is necessary to allow Mr. Burch to reach his other farming operation which would otherwise require him to travel more than 4 miles one way if Fulmore road was closed. Mr. Burch has always used Fulmore road and he has been familiar with it for over 40 years and has been maintained by Williamsburg County. Willie "Buck" Fulmore currently lives on Fulmore Road. His Affidavit states that Fulmore road has always been

used and traveled by the public and plowed by Williamsburg County. All kinds of traffic have used the road, including school buses and this has been true since the late 1920s of his own personal knowledge. James William Hanna has lived in the area all of his life and travels the road regularly to get access to his property in the vicinity of Fulmore road. Hanna's Affidavit states that the road has been maintained by Williamsburg County for at least 40 years. C. B. Askins, Sr.'s Affidavit states that Fulmore road has been plowed or used by the public for at least 20 or more years. John Benson Rodgers is 65 years of age and was born and raised on Fulmore Road and as long as he has been alive, Fulmore road has been used and traveled by the public as well as maintained by Williamsburg County. He has personally witnessed the public's use of the road and County maintenance for over 60 years. Additionally, he is responsible for Rodgers Cemetery on Fulmore road which has been opened for longer than he has lived and people have always used Fulmore road to get to the Cemetery. Zell Gaskin was born and raised on Fulmore road. She confirms that the road has always been open to and used by the public. Gaskins' father lived on the road and used it since at least 1899. Finally, Margaret C. McAlister Lynch is a lifelong resident of the area and owns 515 acres on both sides of Fulmore road adjacent to the Askins Tract. She has owned the property since 1961 (over 35 years) and states that the road has been used by

the public all of these years she has owned the property. Since 1961, Lynch has utilized the road on a regular, almost daily basis and it has been plowed and maintained by Williamsburg County since she has owned the property in 1961.

2) Williamsburg County has maintained Fulmore road at least monthly or as often as weather will permit for more than 20 years, has installed concrete pipe under the road to direct water on at least 2 occasions prior to or in 1978, and has hauled numerous loads of dirt to repair this road (depositions of Moseley, Gause and Affidavit of Moseley).

3) R. V. Askins, Sr., a predecessor in title and creator of the RVA Trust has been seen on numerous occasions observing County work being performed on the Fulmore road as it passes through his property and has accepted the improvements performed by Williamsburg County for more than 40 years (deposition of Raleigh Gause).

4) The General Highway System maps published by the Department of Transportation since 1966 show Fulmore road as a County maintained road on the State Highway System map. (See, 1968 map).

LEGAL ISSUES

The County's Complaint alleges that the public has acquired the right by dedication and/or prescription to use Fulmore Road as a part of the County Road system; that the public has acquired the rights to use the road through long public usage and in fact, the road has been shown as a county road on the state highway map since 1968. The determination of the existence of an easement is a question of fact in a law action. *Revis v. Barrett*, ____ S.C. ____, 467 S.E.2d 460 (1996); *Jowers v. Hornsby*, 292 S.C. 549, 357 S.E.2d 710 (1987).

DEDICATION TO PUBLIC USE

In order to prove and perfect dedication, two elements must be proved:

1. The owner must express in a positive and unmistakable manner the intention to dedicate his property to public use;

2. There must be an acceptance of such property by the public. *Horry County, et al. v. Laychur*, ____ S.C. ____, 434 S.E.2d 259. The intention to dedicate and the acceptance of the dedication must be proven by clear and convincing evidence. *Tyler v. Guerry*, 251 S.C. 120, 160 S.E.2d 889 (1968).

The plaintiff's case is analogous to *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977). In that case Darlington County brought an action against owners of a tract of land to determine the right of the public to use a recreational area known as Whipples Landing, located on Louther's Lake, and a dirt road which connected the public road with the landing area. The lower court heard evidence and ruled in favor of the County holding the public had acquired the right by dedication and/or prescription to use the road as a part of the county road system; that the public had acquired rights in the landing area through long public usage; and the state owned the land bordering the lake up to the ordinary high water mark.

The Defendants in *Darlington v. Perkins* argued *Tyler v. Guerry*, supra, that the land encompassing the roadway is unenclosed and unimproved woodland and therefore mere public usage does not create a dedication or right of way by prescription. The defendants in the present action also argue this case is analogous to *Tyler v. Guerry*. However, the extensive long-term public maintenance in this matter is similar to the facts of *Darlington v. Perkins* in which the Court found the road to be an improved area due to extensive public maintenance. The extensive public maintenance of Fulmore Road has created what amounts to an improved area. The Court in *Darlington v. Perkins* went on to say:

We are of the view, however, that the continuous and wide spread public usage of the road for at least fifty years, without charge or interference from previous owners and these landowners, clearly establishes the public character of the road. This conclusion is fortified by the extent and duration of the maintenance which the County has performed on the road. The testimony of the County Manager White reflects that the County installed a drainage system adjacent to the road, ditched the road on numerous occasions, cleaned the ditches and plowed the road from time to time, all at the request of various members of the public, and without any assistance from the landowners. The landowners have made no objection to the continued use of the road by the general public, or to the maintenance performed by the County on the road. We conclude that the evidence is sufficient to support a finding that the public has acquired an easement in the road by implied dedication. The intention to dedicate land to the public may be implied from circumstances or by acts or conduct of the owner from which a reasonable inference of an intention to dedicate may be

drawn. 23 *Am Jr 2d, Dedication,* §21. Thus "where acts of the owner justify the public authorities in believing the intention exists and they act on such belief, a dedication may be found to have occurred...' 23 *Am Jur 2d,* supra, §19. Such intention may be manifested by the owners acquiescence in continuous use of the land by the public under the claim of the general public right. 23 *Am Jur 2d,* supra, §28-29. Id at 575, 576.

The facts in this case as set forth herein are nearly identical to the findings of the Court in *Darlington v. Perkins.* These similarities include:

1. Fulmore Road has been subjected to continuous and widespread public use for at least fifty years without charge or interference from the previous owners and these landowners. (Verified Complaint, Affidavit of Mosely, Lynch, Burch, Fulmore and Hanna, Gaskin, and J. B. Rodgers, Deposition of Treme and Gause.)

2. Williamsburg County has installed drainage pipes under Fulmore Road in at least two locations, has cut bushes on the road, has repaired the road and has maintained the road constantly for at least twenty (20) or more years and has maintained it almost monthly for the

past twenty years. (Affidavit and Depos. Of Mosely, Depos. Of Gause and Treme.)

3. Predecessor in title and current party who has created R. V. Askins Trust, current title holder R. V. Askins, Sr., has been seen observing the county work taking place on the road without objection. (Depos. Of Gause.) The landowners have made no objection to the continued use of the road by the general public or to the maintenance performed by the County on the road. (Depos. Of Gause.)

ANALYSIS:

The Court noted in *Darlington v. Perkins* that the intention to dedicate land to the public may be implied from circumstances or acts or conduct of the owner which a reasonable inference of an intention to dedicate may be drawn. Here it is reasonable to draw such an inference based upon the fact that for over 30 years, the road in question has been listed on the State Highway map as a County maintained road; the public has continuously used the road for over 60 years; the County has maintained the road for at least 30 or more years, depending upon whose Affidavit is being used; the County maintenance included not only scraping the road but installing drainage pipe and hauling dirt to repair the road; and most conclusively that the owner who attempts

to block the easement, R. V. Askins, has been seen observing the County work taking place, has never objected to County maintenance although he has not personally requested any work from the County. The intention of the landowner is manifested by his acquiescence in the continued use by the public as well as the maintenance by the County.

The defendants cite both *Cleland v. Westvaco Corp.*, 314 S.C. 508, 431 S.E.2d 264 (Ct. App. 1993) and *Mack v. Edens*, 320 S.C.236, 464 S.E.2d 124 (Ct. App. 1995) as support there has been no public dedication. However an important distinction between those two cases and the present case must be made. In both *Cleland* and *Mack* there was no evidence of public maintenance introduced.

The defendants also argue that because they have paid taxes on this land it tends to show there has been no dedication. This Court admits this fact should be considered as evidence but is not enough to outweigh the evidence of public dedication shown by the extensive maintenance.

EASEMENT BY PRESCRIPTION

In order to establish an easement by prescription, the Plaintiff Williamsburg County must prove several elements:

1. There must be continued and uninterrupted use or enjoyment of the right for a period of twenty years;

2. The identity of the things enjoyed must be proven; and

3. The use must have been adverse or under a claim of right. *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977).

Defendant concedes that there is continued and uninterrupted use or enjoyment by the public for more than twenty years and that the identity of the thing enjoyed is proven. Defendant contends that the use must have been adverse or under a claim of right and the Plaintiffs claim is not adverse. As Defendant recognizes in *Horry County, et al. v. Laychur*, __ __S.C. ____, 434 S.E.2d 259 (1993), the Court found that where the landowner testified that he was aware of and gave permission for his land to be used by the general public, the Court concluded that the public's use was not adverse and consequently no easement by prescription had been established. However, in *Revis v. Barrett*, 321 S.C. 206 467 S.E.2d 460 (Ct. App. 1996), the South Carolina Court of Appeals held that a prescriptive easement can be established by use which is either adverse or under a claim of right. The *Revis* court dealt with Barrett's challenging the lower court's finding that Revis' claim

was based on permissive use of the property and therefore was not adverse. The Court found that Revis was under the impression that she had a continuing right to use the road originating with her parent's use of the roadway. The Court found this was ample evidence to support the master's findings that Revis' belief about her right to use the road flowed from a "claim of right" not from Barrett's express grant or permission. Id at 210.

Other courts had misinterpreted this third element by requiring that it be adverse and under a claim of right. The *Revis* court distinguished the two in footnote 1 where it said:

> We recognize there are several cases that appear to require, in addition to the other elements, use that is both adverse and under a claim of right. Citing *County of Darlington v. Perkins, Shia v. Pendergrass, Melloms v. Cousins,* (citations omitted). However, these cases ultimately relied upon, yet misquoted *Babb v. Harrison* as authority for the proposition. Babb requires use that if either adverse or under a claim of right. Accordingly in light of the latter, Supreme Court case of *Horry County v. Laychur,* ____ SC ____, 434 S.E.2d 259

(1993), we believe *Babb v. Harrison* remains a correct statement of the law. Id at 209.

In the present case, citizens of Williamsburg County have used the property under a claim of right. This property has been listed on the state highway maps since 1968 and has continuously been used by the public for more than fifty years. Moreover, the County has maintained the road by putting in drainage pipes, repairing the road, cutting ditches all of which has been in the presence of the predecessors in title. The road connects two undisputed public road and has been used by the citizens of the county on a continuous daily basis for many years. Use of the road flowed from a claim of right as asserted by the various maps published by the South Carolina Department of Transportation and the continued use of the property.

PRIOR COURT ORDERS

Finally, the Defendants have alleged illegal public maintenance in violation of numerous court orders cited in their brief. There has been much litigation in Williamsburg County. However, this road has been maintained specifically under the Order of the Honorable Jonathan Z. McCowan issued on October 22, 1984, Williamsburg County case #84-CP-45-321. Section 2(c) of this Order unquestionably allows the County to maintain

roads which have been in continuous use for more than twenty years without any written documentation. Under the provisions of this Order, Williamsburg County opined that this road had been used for more than twenty years, was in fact on the 1968 state road map and had been plowed for many years prior to 1968 bringing it within the terms of Judge McCowan's Order.

CONCLUSION

There has been public dedication of Fulmore Road and an a public easement by prescription has also been established. The relief sought by the Plaintiffs should be granted. Accordingly, it is

THEREFORE ORDERED, ADJUDGED AND DECREED that Fulmore Road, a county maintained road 1.65 miles in length leading from S.C. Highway S-45-553 to Jones Road, a County maintained road in the Beulah Woods section of Ridge Township, Williamsburg County, be and the same hereby is a public road maintained by Williamsburg County.

IT IS FURTHER ORDERED AND ADJUDGED that the Defendants be and the same hereby are permanently restrained and enjoined from any way blocking and impeding the right of the public to use Fulmore Road or in any way closing Fulmore Road.

AND IT IS SO ORDERED.

s/ M.D. Shuler

M.D. Shuler
Circuit Court Judge

Kingstree, South Carolina

April 30, 1999

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas

M. Duane Shuler, Circuit Court Judge

Opinion No. 2000-UP-552
(S.C. Ct. App. filed Aug. 22, 2000)

County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch, and C.B. Askins, ... Respondents,

v.

Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, ... Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on October 18, 2000.

QUESTIONS PRESENTED

I. Did the Court of Appeals Err in Concluding that Mere Acquiescence in Public Use of Taxed Private Property Provides Cogent and Convincing Evidence of Public Dedication and Acceptance?

II. Did the Court of Appeals Err in Depriving Petitioner of a Portion of His Property Based Upon Acquiescence in Public Use, Because it Deprives Defendant of Private Property Without Due Process or Just Compensation?

III. Does Rule 239(d)(2), SCACR, Providing that Unpublished Decisions Have No Precedential Value, Violates Article I, §8 and Article V, §5 of the South Carolina Constitution.

STATEMENT OF THE CASE

The RVA Trust property has been owned by Petitioner or his father since 1947. No written easement

has ever been granted by a landowner in the chain of title of the RVA Trust property (R. p. 15). During the time that the RVA Trust property has been owned by Petitioner and his father, they allowed neighbors to use a narrow dirt lane crossing their property as a shortcut between two public roads. However, after experiencing numerous trespasses, including the destruction of trees adjacent to the lane and the burning of his family home in April of 1996, Petitioner decided to no longer allow the public to use the lane (R. p. 30). On July 7, 1996, after notifying Plaintiff County of his intent to do so, Petitioner barricaded the portion of "Fulmore" road upon his property (R. p. 30). On August 12, 1996, Respondents brought this action to compel the removal of the barricade.

"Fulmore" road is a 1.6 mile long dirt lane, which intersects with two public roads (R. p. 15). Approximately .7 (7/10) mile of the lane lies upon the RVA Trust tract, and .9 (9/10) mile of the lane lies upon the McAllister Estate tract (R. p. 100). Around 1967, the owner of the McAlister Estate tract dedicated to public use the portion of "Fulmore" road traversing the McAlister Estate tract, and no taxes have been levied or paid upon that portion since that time (R. p. 15). However, Williamsburg County has always assessed and levied property taxes on the entire RVA Trust property, including the portion referred to as "Fulmore" road,

which have always been paid by Petitioner Askins and his predecessors in title (R. p. 16).

There is no depiction of any roadway, public or private, traversing the RVA Trust property in State Highway maps published prior to 1966. An unnamed, unpaved county road is depicted traversing the RVA Trust property in State Highway maps published on and after January 1, 1966 (R. p. 17). "Fulmore" road was first designated as a county road in 1992 (R. p. 16). "Fulmore" road is not identified by that or any other name on any known Plat (R. p. 16). "Fulmore" road does not have any speed limit, street, or other traffic control signs, other than a stop sign at its intersection with the public road on the McAlister Estate tract (R. p. 98). The portion of "Fulmore" road traversing the RVA Trust property averages less than sixteen feet wide (R. pp. 39-40).

Since 1984, Williamsburg County has been ordered not to provide public maintenance on private roads; any public maintenance of "Fulmore" road by Williamsburg County since 1984 has been done without obtaining any easement or affidavits of prescriptive easements from owners living on the road for more than 20 years (R. p. 16). There is no evidence of any actions or statements by Petitioner or his predecessors in title to the RVA Trust tract which would lead Respondents to believe that "Fulmore" road is public (R. p. 17).

The RVA Trust property is primarily field and forest (R. p. 102). There are no homes, businesses or other structures for commercial or residential purposes on the portion of Fulmore road which exists on the RVA Trust property, nor are there any structures that can only be accessed by traversing the portion of Fulmore road which exists on the RVA Trust property (R. p. 101).

The trial court concluded that "[t]here has been public dedication of Fulmore Road and a public easement by prescription has also been established," and granted Respondents a permanent injunction for travel along "Fulmore Road." The Court of Appeals affirmed the judgment of the circuit court finding a public dedication, without reaching the issue of prescriptive easement. *County of Williamsburg v. Askins*, Op. No. 2000-UP-552 (S.C.Ct.App. filed Aug. 22, 2000). Petitioner seeks a writ of certiorari to review that decision.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN HOLDING THAT MERE ACQUIESCENCE IN PUBLIC USE PROVIDES COGENT AND CONVINCING EVIDENCE OF PUBLIC DEDICATION AND ACCEPTANCE

The decision of the Court of Appeals is irreconcilable with the doctrine of public dedication established by this Court, as well as with the legislative encouragement of public use of private property, and the constitutional prohibition against taking private property without due process of law or just compensation.

In order to establish that a portion of the private property owned by the RVA Trust has been dedicated to public use, Respondents were required to prove two elements: 1) The owner must express in a positive and unmistakable manner the intention to dedicate his property to public use; and 2) There must be acceptance of such property by the public. *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992); *Horry County, etc. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (1993). One who asserts a dedication must demonstrate conduct on the part of the landowner clearly, convincingly and unequivocally indicating his intention to create a right in the public. *Anderson v. Town of Hemingway*, 237 S.E.2d 489, 269 S.C. 351 (S.C. 1977); *Derby Heights, Inc. v. Gantt Water & Sewer District*, 237 S.C. 144, 116 S.E.2d 13 (1960); *Shia v. Pendergrass*, 222 S.C. 342, 72 S.E.2d 699 (1952).

The determination of whether a roadway has been dedicated to the public is an action in equity. *Tyler v. Guerry*, 251 S.C. 120, 160 S.E.2d 889 (1968). As such, this Court has jurisdiction on appeal to find facts in

accordance with its own view of the preponderance of the evidence. *Townes Assoc., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976); *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 124 (App. 1995).

A "positive and unmistakable" demonstration of intention to dedicate is normally shown by the granting of an easement or other written instrument. It is undisputed that *no* easement or other grant of a public right of way exists in the chain of title of the RVA Trust property. In two recent decisions of our appellate courts which found public dedication, public rights had been expressly reserved in the chain of title. *Boyd v. Hyatt*, 294 S.C. 360, 364 S.E.2d 478 (App. 1988); *Helsel v. City of North Myrtle Beach*, 307 S.C. 24, 413 S.E.2d 821 (1992). In the present action, no such express dedication exists in the chain of title to the RVA Trust property. The absence of any rights reserved to the public in the RVA Trust chain of title precludes a finding of public dedication. *See, Horry County, etc. v. Laychur*, 315 S.C. 364, 434 S.E.2d 259 (S.C. 1993).

Williamsburg County has annually levied property taxes on the *entire* RVA Trust property, which have always been paid by Petitioner and his predecessors in title. The fact that taxes have been levied and collected on the land as private property tends to show that there has *not* been a dedication and acceptance. 23 Am.Jur.2d,

Dedication § 79. In *Safety Building & Loan v. Lyles*, 128 S.E. 724 (S.C. 1925), the Court concluded that there had been no public dedication of a city square, where taxes continued to be levied on the square, because the levying of taxes refutes acceptance of an offer of dedication. Similarly, in *Horry County, etc. v. Laychur, supra*, this Court rejected Horry County's contention that a landing along the Waccamaw River was public, finding that the County classified, assessed & collected taxes on the entire parcel as private property. The significance of payment of property taxes is demonstrated by the Court's decision one year earlier in *Helsel v. City of North Myrtle Beach, supra*, in which the Court concluded that a street end used for parking and public access to beach had been dedicated for public use, finding that the street end was not taxed by the City.

The Court of Appeals held that Petitioner's acquiescence in long and continued use of the unpaved lane "establishes their intent to dedicate Fulmore Road to the Public." However, extensive public use alone does *not* demonstrate public dedication of private property. *Cleland v. Westvaco Corp.*, 314 S.C. 508, 431 S.E.2d 264 (App. 1993) (extensive recreational use by public of road used to reach river for 50 years does not demonstrate public dedication).

In *Anderson v. Town of Hemingway*, 237 S.E.2d 489, 269 S.C. 351 (S.C. 1977), this Court stated that dedication "may be implied from long use by the public of the land claimed to be dedicated." The *Anderson* case cites *Shia v. Pendergrass*, 72 S.E.2d 699, 222 S.C. 342 (S.C. 1952), but *Shia* held that public use, without more, is not enough:

> The fact that the public was allowed to use the strip of land under circumstances such as exist here, without objection by the owner, is not sufficient from which to imply a dedication. During all of the time that the public has been permitted to use this driveway now in dispute, [the owners] have paid the taxes thereon to the City of Florence; and while this of itself is not generally treated as very strong evidence, still it is some evidence that they did not intend to dedicate it to the public.

Thus, if there is "some evidence" of an intent not to dedicate, by continuing to pay taxes, public use is not sufficient to imply an intent to dedicate.

As the Court of Appeals recently explained in *Mack v. Edens*:

> Nevertheless, dedication is an exceptional mode of passing an interest in land, and proof of dedication must be strict, cogent and convincing. *The acts proved must not be consistent with any construction other than that of a dedication,* and dedication may not be implied from the permissive, sporadic, and recreational use of property.

320 S.C. at 239, 464 S.E.2d at 126 (emphasis supplied); *Town of Estill v. Clarke*, 179 S.C. 359, 184 S.E. 89 (1936). In the present action, Petitioner and his father acquiesced in public use of "Fulmore" road as a shortcut, and to visit the Rodgers Cemetery or the home of Mrs. Lynch, both of which are located on, and can be accessed by traveling over, the portion of the road traversing the McAlister Estate tract. However, Petitioner and his father have always paid property taxes on the entire RVA Trust property. Thus, where the property owner has not expressly dedicated property to public use and continues to pay taxes upon the entire property as private, acquiescence in long-term public use is *consistent with a construction other than that of a dedication,* because it merely demonstrates an intent to be a good neighbor, to permit the public to cross his property, a use *encouraged* by the State of South Carolina.

In 1962, our legislature passed the Limitation on Liability of Landowners Act, commonly known as the Recreational Use Statute, to encourage landowners to make land and water areas available to the public. S.C. Code §§ 27-3-10 to 27-3-70. The legislature broadly defined "recreational purpose" as follows:

> "Recreational purpose" includes, but is not limited to, any of the following, or any combination thereof: hunting, fishing, swimming, boating, camping, picnicking, hiking, *pleasure driving*, nature study, water skiing, summer and winter sports and viewing or enjoying historical, archaeological, scenic, or scientific sites.
>
> S.C. Code § 27-3-20(c) (emphasis added).

In return for the immunity granted by the statute, the landowner may not assess a charge for such use. S.C. Code § 27-3-60(b). Implied permission from the landowner for the public use is sufficient to trigger the immunity. *Brooks v. Northwood Little League, Inc.*, 489 S.E.2d 647, 327 S.C. 400 (S.C. App. 1997).

The decision of the Court of Appeals deprives Petitioner of his property for doing what this State has *encouraged* for nearly forty years—permitting the public

to use private property without charge or interference. The evidence herein demonstrates that the owners of the RVA Trust property allowed the public to use "Fulmore" road as a shortcut and to visit the Rodgers Cemetery without charge or interference. Such conduct does not demonstrate an unequivocal intent to dedicate any portion of the RVA Trust property to the public.

Recognizing the absence of any easement or other express dedication to public use, as well as the taxing of the entire RVA Trust property as private, Respondents attempted to establish public dedication through evidence of public maintenance of the unpaved lane, based upon this Court's decision in *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977). Although the Court of Appeals did not specifically address the issue of public maintenance in concluding that their had been public dedication, it is critical for this Court to understand that the present action is not governed by the *Perkins* case based upon at least three dispositive distinctions. First, there was no evidence in *Perkins* that taxes were levied and paid on the disputed roadway. Second, in *Perkins*, a right of way to the road was reserved in a prior deed to the involved land. Finally, any public maintenance by Williamsburg County in the present action does not reflect an implied intent to dedicate or any acceptance of such an implied dedication.

In *Perkins*, the Court explained the significance of public maintenance upon the issue of public dedication: "where acts of the owner justify the public authorities in believing the intention [to dedicate to public use] exists, and they act on such belief [by providing public maintenance], a dedication may be found to have occurred." *Perkins*, 269 S.C. at 576, 239 S.E.2d at 71. In *Perkins*, there was no evidence that Darlington County performed public maintenance on private roads. To the contrary, Williamsburg County has an unbroken history of publicly maintaining private roads as well as public roads. *Tyler v. Guerry, supra; King v. Poston*, Op. No. 98-UP-435 (S.C. Ct. App. filed Oct. 19, 1998). Consequently, Williamsburg County's public maintenance does not reflect an implied intent to dedicate this private lane to permanent public use.

II. THE COURT OF APPEALS ERRED IN DEPRIVING PETITIONER OF A PORTION OF HIS PROPERTY BASED UPON MERE ACQUIESCENCE IN PUBLIC USE, BECAUSE IT DEPRIVES DEFENDANT OF PRIVATE PROPERTY WITHOUT DUE PROCESS OR JUST COMPENSATION

The high standard of proof required to judicially convert private property into public property is grounded upon the Constitutional prohibitions against public taking of private property. Under Article 1, §13, of the S.C. Constitution, "private property shall not be taken for private use without the consent of the owner, nor for public use without just compensation being first made therefor." The taking of private property without just compensation is similarly prohibited by the Fifth and Fourteenth Amendments to the United States Constitution.

An action for an injunction is equitable. *Blanks v. Rawson*, 296 S.C. 110, 370 S.E.2d 890 (App. 1988). Because this is an action in equity, this Court has jurisdiction to find facts according to its own view of the preponderance of the evidence. *Id.* An order or ordinance compelling the removal of a barrier erected on a private roadway, which is not subject to a public easement, is illegal, as a taking of property without just compensation. *Riley v. Town of Greenwood*, 51 S.E. 532 (S.C. 1905). Because the evidence herein establishes nothing more than permissive public use of an unpaved lane across Petitioner's unimproved property, the granting of the injunction issued herein illegally deprives Petitioner of his private property without just compensation, and must be vacated.

III. RULE 239(D)(2), SCACR, PROVIDING THAT UNPUBLISHED DECISIONS HAVE NO PRECEDENTIAL VALUE, VIOLATES ARTICLE I, §8 AND ARTICLE V, §5 OF THE SOUTH CAROLINA CONSTITUTION, AND DEPRIVES PETITIONER OF DUE PROCESS OF LAW

The Court of Appeals rejected Petitioner's reliance on its unpublished decision in *King v. Poston*, Op. No. 98-UP-435 (S.C. Ct. App. filed Oct. 19, 1998), on the basis of Rule 239(d)(2), SCACR, providing that unpublished decisions have no precedential value and should not be cited. Petitioner submits that Rule 239(d)(2) violates the inherent function of the judicial branch of government as established by our forefathers, and should be found unconstitutional.

The judicial power granted to the courts of this State was that existing at the time of the Constitution. *Carolina Glass Co. v. State*, 87 S.C. 270, 69 S.E. 391 (1910), affirmed 240 U.S. 305, 36 S. Ct. 293, 60 L.Ed. 658 (1916). At the time of our Constitution, the principle of precedent was well-established. Morton J. Horwitz, *The Transformation of American Law: 1780-1860* 8-9 (1977); J.H. Baker, *An Introduction to English Legal History* 227 (1990);

1 Sir William W. Blackstone, *Commentaries on the Laws of England* *69 (1765).

As noted by the United States Supreme Court in *Marbury v. Madison*, 1 Cranch 137, 177-78 (1803), inherent in every judicial decision is a declaration and interpretation of a general principle or rule of law. This declaration of law is authoritative to the extent necessary for the decision, and must be applied in subsequent cases to similarly situated parties. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991); *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821). The doctrine of precedent is essential to separate judicial power from legislative power; the judiciary is to be guided by precedent, and should adhere to precedents unless convincing reasons justify departure from the precedent; in this way, the law develops in response to the dictates of reason rather than the arbitrary opinions of judges. 1 Blackstone, *Commentaries* *258-59. As Justice Story observed in his *Commentaries on the Constitution of the United States* §§377-78 (1833):

> The case is not alone considered as decided and settled; but the principles of the decision are held, as precedents and authority, to bind future cases of the same nature. This is the constant practice under our whole system of jurisprudence. Our

ancestors brought it with them, when they first emigrated to this country; and it is, and always have been considered, as the great security of our rights, our liberties, and our property. It is on this account, that our law is justly deemed certain, and founded in permanent principles, and not dependent upon the caprice or will of judges. A more alarming doctrine could not - be promulgated by any American court, than that it was at liberty to disregard all former rules and decisions, and to decide for itself, without reference to the settled course of antecedent principles.

This known course of proceeding, this settled habit of thinking, this conclusive effect of judicial adjudications, was in the full view of the framers of the constitution. It was required, and enforced in every state in the Union; and a departure from it would have been justly deemed an approach to tyranny and arbitrary power, to the exercise of mere discretion, and to the abandonment of all the just checks upon judicial authority.

Rule 239(d)(2) violates the very essence of judicial decision-making; it permits the members of this Court and the Court of Appeals to choose which cases the court will follow in the future and which it will not. By providing that non-published decisions have no precedential value and cannot even be cited, this Court is essentially saying: "even though we decided this question the opposite way yesterday, we don't even have to consider it today, and you cannot even tell us which way we ruled yesterday!" This unfettered discretion to determine which judicial decisions will have precedential effect exceeds the judicial power granted to the Court in the South Carolina Constitution. Consequently, Rule 239(d)(2) should be declared unconstitutional, and this case should be remanded to the Court of Appeals to consider the precedential effect of its decision in *King v. Poston* in determining the outcome of this case.

Conclusion

The evidence produced herein establishes that no public easement or other public right of way exists in the chain of title of the property involved herein, that Williamsburg County has always levied and received annual property taxes upon the entire tract as private property, and that any public maintenance of the lane was not instigated by any implied or express intention to dedicate the lane to public use by Petitioner or his father.

Evidence of *non-adverse* public use and *illega* public maintenance is insufficient to establish dedication to public use or easement by prescription, and is insufficient to justify the taking of private property without just compensation. Consequently, Petitioner respectfully asks the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY

HONORABLE M. DUANE SHULER, JUDGE
NO. 96-CP-45-262

County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch, and C.B. Askins, Respondents,	)	No. 2000-UP-552
vs.	)	
Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, and Buddy Platt, Defendants,	)	
Of whom Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, is Appellant.	)	

PETITION FOR REHEARING

COMES NOW Appellant, Roland V. Askins, Jr., and respectfully submits his Petition for Rehearing of this action, showing as follows:

1. On August 22, 2000, this Court filed its Opinion affirming the judgment of the trial court. In so holding, this Court found that Appellant's and his predecessors' acquiescence in the public's long and continued use of the road established their intent to dedicate Fulmore Road to the public, such that the road had been dedicated for public use.

2. Appellant submits that, in holding that the road had been dedicated for public use, this Court overlooked or misapprehended the following points:

a) The Constitutional prohibitions against governmental taking of private property without just compensation prohibit the taking of Appellant's property based upon mere acquiescence in public use.

b) No easement, plat or other written instrument demonstrating an intent to dedicate exists in the chain of title of the property involved herein.

c) Evidence that Appellant and his predecessors allowed the public to cross their property without charge or interference, conduct sanctioned by law, does not "unequivocally" demonstrate an intent to dedicate.

Respectfully submitted,

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September 4, 2000

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM WILLIAMSBURG COUNTY

HONORABLE M. DUANE SHULER, JUDGE
NO. 96-CP-45-262

County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch, and C.B. Askins, Respondents,	)	No. 2000-UP-552
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Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, and Buddy Platt, Defendants,	)	
Of whom Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, is Appellant.	)	

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

1. IN HOLDING THAT "FULMORE" ROAD HAD BEEN DEDICATED TO PUBLIC USE BASED UPON MERE ACQUIESCENCE IN PUBLIC USE, THIS COURT OVERLOOKED THE CONSTITUTIONAL PROHIBITIONS AGAINST GOVERNMENTAL TAKING OF PRIVATE PROPERTY WITHOUT JUST COMPENSATION

The Fifth Amendment to the United States Constitution provides that "private property shall not be taken for a public use without just compensation." U.S. Const. amend. 5. There are two main categories of takings: (1) where state law authorizes a permanent physical occupation of property; and (2) where state law so regulates property that it has lost all economic value. *See generally, Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed.2d 798 (1992); *Loretto v. Teleprompter Manhatten CATV Corp.*, 458 U.S. 419, 102 S.

Ct. 3164, 73 L. Ed.2d 868 (1982)(holding a permanent physical occupation authorized by the government is a taking without regard to the public interest it may serve).

In the recent decision of *Main v. Thomason* (S.C. Sup. Ct. filed August 14, 2000)(Davis Advance Sheet No. 33 at 6), the South Carolina Supreme Court distinguished a constitutional exercise of the State's police power from an unconstitutional taking under the Fifth Amendment under *Penn Central* or the *Long Cove* standards[1]:

> The character of the state action in question is an exercise of the police power in order

---

[1]Under federal jurisprudence, three factors are used to determine whether the public benefit from the regulation outweighs the private harm to the landowner: (1) the character of the government action; (2) economic impact of the regulation on the claimant; and (3) the degree the regulation has interfered with distinct investment backed expectations. *Penn Central v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 1.2d 631 (1978). Under South Carolina's jurisprudence, a two prong test is used to determine when a taking has occurred. According to *Long Cove Club v. Town of Hilton Head*, 319 S.C. 30, 458 S.E.2d 757 (1995), a land use does not constitute a taking if: (1) the law in question substantially promotes a legitimate state interest; and (2) the law in question does not deny owner all economically viable use of his land.

to preserve property and prevent waste, not to acquire the Thomasons' driveway permanently for its use.

This Court's construction of the law of public dedication, to permanently deprive a private property owner of his property solely based upon the owner's acquiescence in public use, violates the Constitutional prohibitions against governmental taking of private property without compensation. The constitutional protection of private property requires proof of an unequivocal intent to dedicate by clear and convincing evidence. The evidence herein establishes no express or implied written dedication by any owner of the RVA Trust property, consistent payment of taxes upon the entire tract, permissive public use, and illegal public maintenance. Such evidence is insufficient to justify the taking of private property without just compensation.

2. IN HOLDING THAT "FULMORE" ROAD HAD BEEN DEDICATED FOR PUBLIC USE, THIS COURT OVERLOOKED THE FACT THAT NO EASEMENT, PLAT OR OTHER WRITTEN INSTRUMENT EXISTS IN THE CHAIN OF TITLE OF THE PROPERTY INVOLVED HEREIN

In upholding the trial court's ruling, this Court's opinion overlooks the fact that no evidence of express dedication exists in the chain of title of Appellant's property. A "positive and unmistakable" demonstration of intention to dedicate is normally shown by the granting of an easement or other grant of a public right of way in the property's chain of title; for the RVA Trust property, no such instrument exists from 1800 to the present. The Court's opinion notes that "Fulmore Road" has been depicted as an unnamed, unpaved county road on state highway maps since 1966, and was designated as a county road in 1992. However, dedication of property to the public for a street is not met by maps which show the alleged street, but requires plainly manifested intention to dedicate. *Anderson v. Town of Hemingway*, 237 S.E.2d 489, 269 S.C. 351 (S.C. 1977).

3. IN HOLDING THAT "FULMORE" ROAD HAD BEEN DEDICATED FOR PUBLIC USE, THIS COURT OVERLOOKED THE FACT THAT ALLOWING THE PUBLIC ACCESS TO PRIVATE PROPERTY WITHOUT CHARGE OR INTERFERENCE IS CONDUCT ENCOURAGED BY LAW

South Carolina has legislatively encouraged private property owners to allow the public to use their property without charge or interference. S.C. Code §§ 27-3-10 to 27-3-70. There is no substantive distinction between "acquiescence in public use" and allowing the public to use private property without charge or interference. *Brooks v. Northwood Little League, Inc.*, 489 S.E.2d 647, 327 S.C. 400 (S.C. App. 1997) (implied permission from landowner for public use is sufficient to trigger statute). Consequently, Appellant's acquiescence in public use does not demonstrate an unequivocal intent to dedicate any portion of the RVA Trust property to the public.

The effect of this Court's decision, holding that acquiescence in public use is sufficient to demonstrate an unequivocal intent by the owner to dedicate his property to the public, is to deprive a private property owner of his

property without due process of law and without compensation. A statute offends due process when it does not give fair notice of the conduct it proscribes. *State v. Brown*, 317 S.C. 55, 451 S.E.2d 888 (1994). The statute must give sufficient notice so that a reasonable person can comprehend what the statute prohibits. *Id.*

In holding that lengthy public use demonstrated an intent by the owners of the RVA Trust to dedicate, this Court has misapprehended the law of public dedication. For a dedication to public use to occur, there must be both an offer by the owner and acceptance by the public. 23 Am.Jur.2d Dedication § 43, at 39. Public use of the property implies *acceptance* by the public of an offer of dedication. *Van Blarcum v. City of North Myrtle Beach*, 523 S.E.2d 486, 337 S.C. 446 (S.C. App. 1999); *Tupper v. Dorchester*, 326 S.C. 318, 487 S.E.2d 187 (1997); see 23 Am.Jur.2d Dedication § 51, at 44 (acceptance of offer of dedication may be demonstrated in various ways, including a showing of public use). However, no South Carolina case has ever found an *offer* of dedication solely based upon permissive public use; for an offer to dedicate, the extensive public use must be combined with "positive and unmistakable" indication of the owner's intent to dedicate.

Dedication is not implied from the permissive, sporadic and recreational use of the property, even

though some of it has been used extensively. *State v. Beach Co.*, 248 S.E.2d 115, 271 S.C. 425 (S.C. 1978). In the present action, "Fulmore road" was not even depicted as a road until 1966, *after* the State of South Carolina encouraged property owners to "acquiesce" in public use of their property; Appellants' acquiescence is now being used to deprive them of their property. To hold that mere acquiescence is sufficient to avoid a "taking" is to deprive a private citizen of his property without giving fair notice that such conduct will convert private property into public property.

The Due Process Clause protects against "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all." *A.B. Small Co. v. American Sugar Refining Co.*, 267 U.S. 233, 45 S.Ct. 295, 297, 69 L.Ed. 589 (1925). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application. *Toussaint v. State Bd. of Medical Examiners*, 303 S.C. 316, 320, 400 S.E.2d 488, 491 (1991). The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies. *American Communications Ass'n v. Douds*, 339 U.S. 382, 412, 70 S.Ct. 674, 691, 94 L.Ed. 925 (1950); *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982).

The State of South Carolina, in enacting the Recreational Use statute, encourages private property owners to acquiesce to public use of private property. The decision of this Court holds that such acquiescence is sufficient to deprive a private citizen of his property without compensation. If engaging in conduct sanctioned by the Recreational Use statute will result in the forfeiture of private property, Appellants and the citizens of this State are entitled to fair notice that their conduct will have such draconian consequences.

Consequently, Appellants respectfully request this Court to grant their Petition for Rehearing, grant oral argument before the full Court, and reverse the judgment of the trial court.

Respectfully submitted,

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(2)

Supreme Court, U.S.
FILED
JUL 20 2001

In The
Supreme Court of the United States

ROLAND V. ASKINS, JR., INDIVIDUALLY AND AS TRUSTEE OF RVA TRUST,

Petitioner,

v.

COUNTY OF WILLIAMSBURG, SOUTH CAROLINA; J. WILLIAM HANNA; WILLIE L. FULMORE; MARGARET C. MCALISTER LYNCH; RICHARD F. BURCH; C. B. ASKINS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF SOUTH CAROLINA

RESPONDENTS' BRIEF IN OPPOSITION

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JURISDICTION

This Court's jurisdiction is in doubt because this is a state case where the only federal issue raised by petitioner was not raised when he appealed the trial court's ruling to the South Carolina Court of Appeals. *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969)

STATEMENT OF THE CASE

In July of 1996, petitioner erected dirt barriers across Fulmore Road in Williamson County, South Carolina where it crossed the eastern boundary of his property and at its junction with Beulah Road on his western boundary. Williamsburg County and a number of its citizens then sued petitioner seeking a declaration that Fulmore Road had been dedicated to public use and a permanent injunction preventing interference with the public's use of Fulmore Road. The trial court issued a *pendente lite* order on August 26, 1996, and a final order on April 30, 1999, declaring Fulmore Road to be a public road and permanently enjoining defendant from interfering with public use of the road. The court based its order on an evaluation of all the evidence, making a finding the road had been dedicated to public use. The trial court also found the county and its citizens had obtained an easement by prescription in the roadway. Petitioner then appealed to the Court of Appeals where he did not raise any federal issues or cite any federal constitutional provisions or federal cases. (See Res.App. A1-A6). The Court of Appeals upheld the trial court ruling finding it unnecessary to reach the prescriptive easement issue because the trial court properly found the road had been dedicated to public use. The Court of Appeals denied petitioner's petition for rehearing. The petitioner then petitioned the Supreme Court of South Carolina for a writ of certiorari which was denied. (Pet. App. A-1).

STATEMENT OF FACTS

Fulmore Road is a 1.6 mile improved dirt road connecting Jones Road and Beulah Road in Williamsburg County. Jones Road and Beulah Road are both public roads. There is a stop sign at the eastern end of Fulmore Road at the junction with Jones Road. Fulmore Road crosses two tracts of land known as the RVA Trust Property and the McAllister Estate. Fulmore Road is designated as CR 24-301 on state highway maps. It has been designated as a public county road on the general highway map of Williamsburg County published by the South Carolina Department of Transportation since at least 1968. Several local residents provided evidence that Fulmore Road has been maintained by the county for more than 60 years. (Res. App. B8-B9)

The road has been in existence and used by the general public for at least 100 years. The road has been regularly used by school buses, buggies and cars taking local children to school, and farmers traveling between their homes and their fields. It has long been regularly used by the general public as a means of traveling between Jones Road and Beulah Road. Fulmore Road is a necessary means of access for several local farmers to reach their farm lands. Over the years, it has also provided access to a cemetery and a number of residences located along the road. (Res. App. B8-B9)

Fifty three years ago, petitioner's father purchased the land known as the RVA Trust Property through which .7 (7/10) mile of Fulmore Road passes. For the next forty-nine years, neither petitioner's father nor petitioner did anything to interfere with the public's use of the road or to affirmatively put the county or the public on notice that they were merely allowing permissive use of a road they now claim to be private. They were silent when the road was added to state and county road maps approximately 35 to 40 years ago. They were silent when the road was named

"Fulmore Road" on maps approximately 15 years ago. They even remained silent when the road was designated as County Road 24-301 in 1992. (Res. App. B8-B9)

Until 1996, the only thing petitioner or his father ever did which might be considered inconsistent with the public nature of the roadway was to pay taxes on the entire RVA tract from which the land traversed by the road was not excluded on the tax rolls.

In July of 1996, petitioner erected dirt barriers in the road where it crossed his eastern boundary with the McAllister Estate and at the junction with Beulah Road on his western boundary. (Res. App. B8-B9)

In reaching its decision to uphold the trial court's ruling, the Court of Appeals found that the failure to exclude the area occupied by a road from the tax rolls and the consequent payment of taxes on the area was but one factor to be considered with all the other factors in determining whether a road had be dedicated to public use. The Court of Appeals found the other evidence in this case to outweigh that one factor, specifically noting that the evidence showed Fulmore Road had been publicly maintained as a public road for more than 60 years and that it had been used by all types of general public traffic since at least the late 1920's, approximately 20 years before petitioner's father acquired the land. (Pet. App. A-8 to A-9).

REASONS WHY THE WRIT SHOULD BE DENIED

I. PETITIONER FAILED TO PRESERVE THE FEDERAL ISSUES RAISED IN HIS WRIT WHEN HE FIRST APPEALED THE TRIAL COURT'S DECISION TO THE SOUTH CAROLINA COURT OF APPEALS.

When petitioner appealed to the Court of Appeals he did not raise any federal issues or cite any federal constitutional provisions or federal cases. (See Res.App. A1-A6). Petitioner first made his federal due process

arguments relying on *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978) in his Petition for Rehearing to the South Carolina Court of Appeals. (See Pet. App. A-51 to A-57).

When a party fails to raise an issue in the lower courts, that party waives his right to raise the issue in subsequent appeals. The Supreme Court has said "this Court does not decide questions not raised ... in the lower court[s]." *Taylor v. Freeland*, 503 U.S. 638, 645 (1992) citing *Youakin v. Miller*, 425 U.S. 231, 234 (1976). The Supreme Court considers questions raised by the petitioner in a petition for certiorari which were not preserved in the courts below only in exceptional cases and only when the cases come from the federal courts. As this Court pointed out in *Kentucky v. Stincer*, 482 U.S. 730, 747-748 fn 22 (1987), "it is 'the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed ... in the courts below.'" See also *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940); *Heckler v. Campbell*, 461 U.S. 458, 468-469 n.12 (1983).

This Court rigorously enforces its refusal to consider cases where the petitioner's federal issues were not preserved in the state courts below, declining to review such issues even where it might otherwise do so had the lower courts considering the case been federal courts. This principle is applicable even where the issue not preserved below is an issue of federal constitutional law. In *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969), in dismissing a writ improvidently granted because of lack of jurisdiction, this Court said:

Although certiorari was granted to consider this question, the fact emerged in oral argument that the sole federal question argued here had never been raised, preserved, or passed upon in the state courts below. It was very early established that the court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell v. Randell*, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings v. Norwood's Lessee*, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, 25, 1 Stat. 85, vested this Court with no jurisdiction unless the federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller v. Nicholls*, 4 Wheat 311, 315 (1819) and since, e.g. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Assn.*, Inc.360 U.S. 344, 342, n.7 (1959); *State Farm Mutual Automobile Ins. Co. v. Duel*, 324 U.S. 154, 160-163 (1945); *McGoldrick v Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940); *Whitney v. California*, 274 U.S. 357, 362-363 (1927); *Dewey v. Des Moines*, 173 U.S. 193, 197-201 (1899); *Murdock v. City of Memphis, 20 Wall. 590 (1875).*

Petitioner in this case did not raise federal constitutional due process issues in his initial appeal to the South Carolina Court of Appeals. Thus, he waived his right to raise these issues. His petition for rehearing and his petition for writ of certiorari to the South Carolina Supreme Court were denied. This Court should likewise deny his current petition because he did not preserve the issue below in the state courts of South Carolina.

II. THIS CASE TURNS UPON THE APPLICATION OF EVIDENCE AND FACTS TO WELL SETTLED RULES OF STATE LAW

The Petition should be denied because the judgment of the trial court in this case was driven by an evaluation of the evidence applied to well settled principles of state law. Contrary to petitioner's assertions, there has been no change in South Carolina law. This case does not depend upon a decision of law, much less a question of federal significance worthy of this Court's attention.

Petitioner admits that he and his family have permitted others to use Fulmore Road to travel between Beulah Road and Jones Road since his family acquired the surrounding track in 1947. He admits Fulmore Road has been shown as a county road on maps since 1966, that Fulmore Road was given a county road number designation in 1992, and that Fulmore Road has been maintained by the County since at least 1977. He also admits that the trial court had evidence from several local residents showing regular use by the public and school buses for more than 40 years. (Pet. pp. 6-8; Pet. App. at A-35) The evidence, however, shows extensive public use for an even longer period. It shows Fulmore Road has been in existence and regularly used by the public for over a century. The evidence also shows the road has been maintained by the

county for public use for more than 60 years, and that no prior objections to county maintenance or public use have been raised by petitioner's family or predecessors in title for more than half a century. The Court of Appeals specifically noted that the evidence showed Fulmore Road had been used by all types of general public traffic since at least the late 1920's, which is approximately 20 years before petitioner's father acquired the RVA tract. (Pet. App. A-8 to A-9).

Based on this evidence, both the Trial Court and the Court of Appeals made a specific factual finding that the evidence provided strict, cogent and convincing proof of a voluntary and intentional dedication of Fulmore Road to public use by petitioner's predecessors and petitioner.. (Pet. App. A-6 to A-9).

This Court has recognized that in appropriate circumstances, both the intent to dedicate and public acceptance of dedication can be implied. *Weems Steamboat Co. Of Baltimore City V. People's Steamboat Co.*, 214 U.S. 345, 357 (1909). It has been well settled under South Carolina law for many years that the intent to dedicate land to public use can be clearly and convincingly proved through proof of long term acquiescence to public use, especially where the road or area has been improved by public maintenance. *Anderson v. Town of Hemingway*, 237 S.E.2d 489, 269 S.C. 351 (1977) citing *Shia v. Pendergrass,* 222 S.C. 342 ,72 S.E.2d 699 (1952) ; *County of Darlington v. Perkins*, 269 S.C. 572, 239 S.E.2d 69 (1977); *Mack v. Edens*, 320 S.C. 236, 464 S.E.2d 124 (S.C. App. 1995). Over 20 years ago, in *County of Darlington v. Perkins*, the South Carolina Supreme Court said:

We are of the view, however, that the continuous and wide spread public usage of the road for at least fifty years, without charge or interference from previous owners and these landowners, clearly establishes the public character of the road. This conclusion is fortified by the extent and duration of the maintenance which the County has performed on the road. The testimony of the County Manager White reflects that the County installed a drainage system adjacent to the road, ditched the road on numerous occasions, cleaned the ditches and plowed the road from time to time, all at the request of various members of the public, and without any assistance from the landowners. The landowners have made no objection to the continued use of the road by the general public, or to the maintenance performed by the County on the road. We conclude that the evidence is sufficient to support a finding that the public has acquired an easement in the road by implied dedication. The intention to dedicate land to the public may be implied from circumstances or by acts or conduct of the owner from which a reasonable inference of an intention to dedicate may be drawn. 25 Am. Jur. 2d, Dedication § 21. Thus, "where acts of the owner justify the public authorities in believing the intention exists and they act on such belief, a dedication may be found to have occurred." 23 Am Jur.2d, supra, § 19. Such intention may be manifested by the owners acquiescence in continuous use of the land by the public under the claim of the general public right. 23 Am Jur. 2d, supra, § 28-29. 269 S.C. 572, 575-576.

As the trial court pointed out, the facts in this case are almost identical to the facts in *County of Darlington.* (Pet. App. pp. A-21 to A-22). Petitioner is incorrect in his statement that the Court of Appeals did not consider the maintenance of Fulmore Road in finding an intent to dedicate. In the portion of its opinion labeled "Discussion" where the court points out the evidence supporting the intent to dedicate, the Court specifically points out the evidence of a long period of continuous maintenance and emphasizes the continuing maintenance even after Williamsburg County ceased maintaining private roads. (Pet. App. at A-8 to A-9). Both the Trial Court and the Court of Appeals addressed petitioner's argument concerning the history of Williamsburg County road maintenance and rejected it, finding that the continuous use of the road by the public for more than 20 years and the order permitting continuation of maintenance after the County was ordered to discontinue maintaining private roads indicated the maintenance of Fulmore Road had always been maintenance as a public road at the request of the public. (Pet. App. at A-26 to A-27 and A-8 to A-9;) It should also be noted that while Williamsburg County had a history of maintaining private roads at the request of the landowner, petitioner adamantly asserts that the maintenance of the road traversing his land was not done at the request of the landowner. (Pet. p. 7) Thus this case is not distinguishable from *County of Darlington v. Perkins.*

Furthermore, the cases which petitioner relies upon for the proposition that permissive use is not sufficient use to prove intent to dedicate under South Carolina law are clearly distinguishable from the facts of the present case. As *Mack v. Edens*, 320 S.C. at 239, 464 S.E.2d at 126, points out, permissive use may not be sufficient evidence of intent to dedicate where the use is *sporadic and recreational.*

In *Shia*, one neighbor claimed that visitors to his house had been permitted to drive over another's neighbors alley to reach his back door. In *Cleland v. Westvaco Corp.*, 431 S.E.2d 264 (S.C. App. 1993), the sole purpose for public use traversing the defendant's land was to reach a landing on a river. The *Cleland* court described the public's use as "*recreational use* of the road to reach Mose Landing ... " 431 S.E.2d at 266

The evidence in this case, however, shows Fulmore Road is part of the normal flow of public traffic in the area. It is used daily by farmers and their employees going to and from their work in the fields and by public vehicles such as school buses. None of the use evidence in this case could be considered recreational use under S.C. Code Ann. § 27-3-20 (1977). Petitioner claims that the use is pleasure driving, but school buses transporting children to and from school and farmers and their employees traveling to and from their fields is not pleasure driving.

The trial court made a specific finding that the public use of Fulmore Road was neither sporadic nor recreational stating:

> This property has been listed on the state highway maps since 1968 and has continuously been used by the public for more than fifty years. Moreover, the County has maintained the road by putting in drainage pipes, repairing the road, cutting ditches all of which has been in the presence of the predecessors in title. The road *connects two undisputed public roads and has been used by the citizens of the county on a continuous daily basis for many years.* (Pet. App. A-26, emphasis added).

The Court of Appeals, which makes its own findings of facts in actions in equity such as public dedication actions, also specifically noted:

> Fulmore Road is a dirt road approximately 1.6 miles long, which connects two public roads. ... Willie Fulmore stated that all types of traffic, including school buses, have used Fulmore Road since the late 1920's. The other individual Respondents similarly stated the public had regularly used the road for as long as they had been familiar with it. They complained the Appellants' barricading of the road created problems for them and for all the residents of the area by interrupting the normal flow of traffic. (Pet. App. A-6 to A-8)

Furthermore, the portion of *Shia* which petitioner cites specifically states that payment of taxes is only weak evidence of the lack of intent to dedicate land to public use. (Pet. App. A-40). Payment of taxes is the only evidence in this case tending to indicate a lack of intent to dedicate, and both the South Carolina Court of Appeals and the Trial Court found that this weak inference against intent to dedicate was far outweighed by many other factors clearly and convincingly proving an intent to dedicate in this case.

While petitioner adamantly claims that he did not intend to dedicate Fulmore Road to the public, there is no claim anywhere in his arguments before the South Carolina Court of Appeals, the South Carolina Supreme Court or this Court that the land owners prior to his family's acquisition in 1947 lacked an intent to dedicate Fulmore Road to public use. However, both the Trial Court and the Court of Appeals noted regular public use going back to at least the late 1920's, approximately 20 years prior to acquisition of the land by petitioner's family. Both courts also pointed out evidence of public maintenance prior to acquisition of the

land by petitioner's family. And both courts specifically rest their findings of intent to dedicate on the intent of petitioner's predecessors as well as petitioner's family.

Two courts have now independently viewed the evidence in this case and made findings that the evidence clearly and convincingly proves the intent to dedicate Fulmore Road to public use by petitioner's predecessors in title and petitioner following clearly established principles of South Carolina law that have not changed for decades and which is consistent with the law of other states. There has been no change in South Carolina law and certainly no change worthy of expending this Court's precious time and resources.

III. NO TAKING OF PRIVATE PROPERTY OCCURS WHEN THE EVIDENCE SHOWS VOLUNTARY AND INTENTIONAL DEDICATION TO PUBLIC USE.

Petitioner relies on *Dolan v. City of Tigard*, 512 U.S. 374 (1994) in his due process arguments, claiming the Courts of South Carolina have "forced" a dedication of his land to public use. However, there is no forced dedication in this case. Two courts have independently examined the evidence and found clear and convincing proof that petitioner's predecessors and petitioner intentionally dedicated Fulmore Road to public use. Intent is a question of fact, not a question of law. Petitioner has had his day in court. Respondents have met their burden of proof. Fulmore Road was intentionally given to the public. It was not taken, with or without due process. The discussion of both the concept of public dedication and compensation for a public taking in this Court's decisions running from *Weems Steamboat Co. Of Baltimore City v. People's Steamboat Co.* to *Dolan* clearly indicate that where the evidence supports a finding of an intentional and voluntary public dedication, there is no taking. The non-existence of a taking is implicit in the finding of an intent to dedicate.

CONCLUSION

The Trial Court and the Court of Appeals, upon independent examination of the evidence in this case, both found that the evidence clearly and convincingly proved that petitioner's predecessors in title and petitioner's family intended to dedicate Fulmore Road to public use. That dedicated was accepted by over a century of regularly non recreational use by the public as part of the normal flow of traffic in the area. These factual findings are consistent with long standing South Carolina law, as well as a decision of the Court, that in appropriate circumstances both the intent to dedicate and the public acceptance of dedication can be implied from long term public use, especially when supported by other factors such as long term public maintenance of a road. This case presents a straight application of facts to well settled law. It presents no issues of law worthy of this Court's consideration. Furthermore, petitioner failed to preserve his federal constitutional arguments in the lower state courts, and therefore, under this Court's ruling in *Cardinale v. Louisiana*, it lacks jurisdiction. Accordingly, the Petition should be denied.

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APPENDIX A

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS
APPEAL FROM WILLIAMSBURG COUNTY
HONORABLE M. DUANE SHULER, JUDGE
NO. 96-CP-45-262

County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch, and C.B. Askins, Respondents,	)
vs.	)
Roland V. Askins, Jr. Indivuidally and as Trustee of RVA Trust, and Buddy Platt, Defendants,	)
Of whom Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, is Appellant.	)

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I. STATEMENT OF ISSUES ON APPEAL

A. Did the Trial Court Err in Concluding that Plaintiffs have Established a Public Dedication of "Fulmore" Road, Because Plaintiffs Failed to Provide Cogent and Convincing Evidence of Public Dedication and Acceptance?

B. Did the Trial Court Err in Concluding that Plaintiffs have Established a Prescriptive Easement in "Fulmore" Road, Because the Evidence Establishes Permissive Public Use Upon Unimproved Land?

C. Did the Trial Court Err in Granting Plaintiffs an Injunction Prohibiting Defendant from Impeding the Public from Using the Portion of Fulmore Road Crossing Defendant's Property, Because it Deprives Defendant of Private Property Without Just Compensation?

II. STATEMENT OF THE CASE

In this action, the trial court declared that a portion of the property titled in the name of the RVA Trust had become public property by dedication to public use and public prescriptive easement, and granted a permanent injunction to prohibit Defendants from blocking public access thereto. The trial court rejected Defendant's request for a judgment declaring that the entire RVA Trust property is private, including the unpaved lane involved herein, which Plaintiffs refer to as "Fulmore" road. There is no dispute as to whether there is a lane traversing the RVA Trust property which has been traveled by the public; the only issue is whether the portion of the lane which lies upon the RVA Trust property is public or private.

"Fulmore" road is a dirt road of approximately 1.6 miles in length, which intersects with S.C. highway S-45-553 (Beulah road) on its western end, and Jones Road on its eastern end. Both Beulah road and Jones road are public roads (R. p. 15). "Fulmore" road traverses through two separate

* * *

APPENDIX B

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM WILLIAMSBURG COUNTY
Court of Common Pleas
HONORABLE M. DUANE SHULER, JUDGE

Case No.: 96-CP-45-262

County of Williamsburg, and J. William Hanna, Willie L. Fulmore, Margaret C. McAlister Lynch, Richard F. Burch and C. B. Askins
Respondents

v.

Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, and Buddy Platt
Defendants.

Of whom Roland V. Askins, Jr., Individually and as Trustee of RVA Trust, is Appellant.

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Townes Assoc., Ltd. v. City of Greenville,
266 S.C. 81, 221 S.E.2d 773 (1976). 7,17

Tyler v. Guerry,
251 S.C. 120, 160 S.E.2d 889 (1968).

Other Authorities

23 Am. Jur. 2d *Dedication* § 19 12

Black's Law Dictionary 6th ed. 16 (1991). 12

STATEMENT OF ISSUES ON APPEAL

I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE FULMORE ROAD HAD BEEN DEDICATED TO PUBLIC USE.

II. WHETHER THERE IS ANY EVIDENCE IN THE RECORD SUPPORTING THE TRIAL COURT'S FINDING THAT THE PUBLIC HAD ACQUIRED A PRESCRIPTIVE EASEMENT IN THE FULMORE ROAD.

STATEMENT OF THE CASE

Williamsburg County and other Plaintiffs filed a Rule to Show Cause on August 12, 1996, after the Appellant Roland V. Askins, Jr., individually and as Trustee of RVA Trust, and Buddy Platt barricaded a road known as the Fulmore Road on July 4, 1996. The Appellant filed an Answer and Counterclaim and Return to Rule to Show Cause with an Affidavit of Roland V. Askins, Jr., on August 16, 1996. A Hearing on the Rule to Show Cause was held on August 16, 1996, and an Order was issued on August 21, 1996, by the Honorable M. D. Shuler, granting relief of leaving the road open *pendente lite.*

Defendants filed a Motion for Summary Judgment and supporting memoranda on February 13, 1997, and a Hearing was held on November 20, 1997, before the Honorable Howard P. King. At such time, he denied the Defendants Motion for Summary Judgment by Order dated November 25, 1997.

A merits hearing was held before the Honorable M. D. Shuler, and an Order was issued by Judge Shuler on April 30, 1999, ordering that the Fulmore Road was a public road maintained by Williamsburg County and permanently enjoined and restrained the Appellant from blocking and impeding the right of the public to use the Fulmore Road. This appeal followed. The Appellants timely filed a Notice of Appeal on May 7, 1999.

FACTS

The Fulmore Road is a dirt road of approximately 1.6 miles in length which intersects with S.C. Highway S-45-553 (Beulah Road) on its western end, and Jones Road on its eastern end. Both Beulah Road and Jones Road are public roads. R.15. The Fulmore Road traverses through two separate tracts of private property: the RVA Trust tract on the eastern end, and the McAlister Estate tract on the western end. R.15.

Fulmore Road is designated as CR 24-301 on the state highway map system and has since at least 1968 been designated as a "county road" on the general highway map of Williamsburg County, South Carolina, prepared by the South Carolina Department of Transportation in cooperation with the United States Department of Transportation, Federal Highway Administration. R.16,17; R.App. 2, line 23 – R.App.3, line 21. Williamsburg County has maintained Fulmore road at least monthly or as often as weather would permit for more than twenty (20) years, has installed concrete pipe under the road to direct water on at least two occasions prior to or in 1978, and has hauled numerous loads of dirt to repair this road. R.16; R.81, line 11 – R.82, line 23; R.87, line 4 – R.88, line 20; R.53, line 10 – R.54, line 3, R.55, lines 1-4; R.27-28.

A number of citizens including Richard F. Burch, Willie "Buck" Fulmore, James William Hanna, C. B. Askins, Sr., John Benson Rodgers, Zell Gaskin and Margaret C. McAlister Lynch all live on or near the road in question and have submitted Affidavits in this case. R. 21, R.19, R. 24, R.23, R.25, R.App. 1, R. 20. Fulmore Road is necessary to allow Mr. Burch to reach his other farming operation which would otherwise require him to travel more than four (4) miles one way if Fulmore Road was closed. R.21. Mr. Burch has always used Fulmore road and he has been familiar with it for over 40 years and knows that it has been maintained by Williamsburg County. R.21.

Willie Buck Fulmore currently lives on Fulmore Road. His Affidavit states that Fulmore road has always been used and traveled by the public and plowed by Williamsburg County. Mr. Fulmore went further to state that all kinds of traffic have used the road, including school buses since the late 1920s of his own personal knowledge. R.19.

James William Hanna has lived in the area all of his life and travels the road regularly to get access to his property in the vicinity of Fulmore Road. Hanna's Affidavit states that the road has been maintained by Williamsburg County for at least 40 years. R.24.

C. B. Askins, Sr.'s Affidavit states that Fulmore Road has been plowed or used by the public for at least 20 or more years. R.23.

John Benson Rodgers is 65 years of age and was born and raised on Fulmore Road, and as long as he has been alive, Fulmore Road has been used and traveled by the public as well as maintained by Williamsburg County. He has personally witnessed the public use of the road and County maintenance for over 60 years. Additionally, he is responsible for Rodgers Cemetery on Fulmore road which has been operated for longer than he has lived, and people have always traveled the Fulmore Road to get to the Cemetery. R.25.

Zell Gaskin was born and raised on Fulmore Road. She confirms that the road has always been open to and used by the public. Gaskins' father lived on the road and used it since at least 1899. R.App.1.

Finally, Margaret C. McAlister Lynch is a lifelong resident of the area and owns 515 acres on both sides of Fulmore road adjacent to the Askins tract. She has owned the property since 1961 and states that the road has been used by the public all of the years she has owned the property. Since 1961, Lynch has utilized the road on a regular, almost daily basis, and it has been plowed and maintained by Williamsburg County since she has owned the property in 1961. R.20.

R. V. Askins, Sr., a predecessor in title and creator of the R. V. Askins Trust has observed on numerous occasions county work being performed on the Fulmore Road as it passes through his property and has accepted the improvements performed by Williamsburg County for more than forty (40) years. R.62, line 25 – R.63, line 8, lines 22-23, R.58, line 19--R.59, line 10.

ARGUMENTS

I. Standard of Review.

In its review of this action, the Court must utilize varying standards of review depending on the issues presented. An action to determine whether a roadway has been dedicated to the public is an action in equity. Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (1968). Additionally, the scope or extent of an easement is a question in equity; however, the existence of an easement is a question of fact in a law action. Eldridge v. City of Greenwood, 331 S.C. 398, 503 S.E.2d 191 (Ct.App.1998). As to the equitable matters, this court can find facts in accordance with its own view of the preponderance of the evidence. Townes Assoc. Ltd. v. City of Greenville, 266 S.C. 81, 221 S.E.2d 773 (1976). However, as to the question of fact in the action at law on the determination of whether or not a prescriptive easement exists, this Court reviews factual findings only for evidence which reasonably supports the trial judge's findings. Eldridge at 398.

In the present situation, the County can meet its burden by a preponderance of evidence that the Fulmore Road was dedicated to the public and accepted by Williamsburg County. Furthermore, evidence is present in the record to support the trial judge's finding of a prescriptive easement.

II. The Fulmore Road was Dedicated to Public Use.

The necessary elements the County must prove to show dedication to public use are 1) the owner must express in a positive and unmistakable manner his intention to dedicate his property to public use; and 2) there must be an acceptance of such property by the public. Horry County v. Laychur, 315 S.C. 364, 434 S.E.2d 259 (1993).

A. The Owner expressed in a positive and unmistakable manner his intention to dedicate the property to public use.

In the present case, evidence of an express dedication of the Fulmore Road to public use exists in the form of public maps and plats. One 1966 plat on lands of Carol R. McAllister (now owned by the Lynch family) reveals unlabeled dashed lines across the RVA Trust property where the Fulmore road is situate. R.104. An unnamed road, depicted as an unpaved county road, is depicted traversing the RVA Trust property in State Highway maps published on and after January 1, 1966. R.17. Fulmore Road was first formally named and identified as such on maps by J. D. Brockington in or about 1984. R.16. Finally, Fulmore Road was given a county road number CR-24-301 by William Wheeler under a contract with Williamsburg County in 1992. R.16.

However, an intention to dedicate property to public use "need not be made by deed or other writing, but may be effectually and validly made by acts or verbal declarations." Boyd v. Hyatt, 294 S.C. 360, 364 S.E.2d 478 (Ct.App. 1988). Intent to dedicate can be implied from circumstances or the acts and conduct of the owner which give rise to such an inference. County of Darlington v. Perkins, 269 S.C. 572, 239 S.E.2d 69 (1977). When proving an implied public dedication, the proof must be strict, cogent and convincing, and the acts proved must be inconsistent with any

construction other than dedication. Cleland v. Westvaco Corporation, 314 S.C. 508, 431 S.E.2d 264 (Ct.App. 1993).

Although dedication may not be implied from permissive, sporadic and recreational use of the property, Id citing State v. Beach Co. 271 S.C. 425, 248 S.E.2d 115 (1978), an owner's intent to dedicate may be implied from the long public use of the land to which the public claims dedication. Id. citing Hoogenboom v. City of Beaufort, 315 S.C. 306, 433 S.E.2d 875 (1992) reh'g denied 317 S.C. 12,451 S.E.2d 393 (1994).

1. Extensive long term public usage implies an unequivocal intent to dedicate.

Because an intention to dedicate may be implied from the circumstances, County of Darlington, at 575, a review of the particular circumstances of the extensive long term public usage is mandated.

In the present case, this road connects two public roads. R.15. Richard Burch, a local farmer, submitted an Affidavit stating that he has traversed the Fulmore Road for over 40 years, knew it to be a public road maintained by the county, and is necessary to allow him and his employees to reach his farming operation which would otherwise require him to travel more than four miles one way if the Fulmore Road was closed. He goes further to state "the road has always been used commonly and regularly by the public. It has always been a public road." R.21.

Willie "Buck" Fulmore, a sixty-nine-year-old gentleman was born and raised on Fulmore Road and has lived there all of his life. He states, "I can report that Fulmore Road has always been used and traveled by the public. I can also state that the road has always been plowed by Williamsburg County. All kinds of traffic used the road on a regular basis, including school buses. I personally know this has been true since the late 1920's and I am told

the road was there for much longer than I have been alive." R.19.

James William Hanna has lived in the area his entire life and travels the road regularly to get access to his property in the vicinity of the Fulmore Road. He stated that barriers on the section of Fulmore Road across the RVA Tract have severely limited access to his family's property. Also, the barriers interrupted the normal flow of traffic in the area. He states as follows "Having lived in this area all of my life, I can state unequivocally that Fulmore Road has always been used and traveled commonly and regularly by the public. I can also report that the road has been maintained by Williamsburg County for at least forty years." R.24.

C. B. Askins, Sr., a neighboring land owner, stated that he has been familiar with the Fulmore Road for twenty years. He states that "the road has always been used by the public," and "it has always been maintained by Williamsburg County." He states that the Fulmore Road . . . had been unilaterally closed by a landowner. That has created a problem for all of the residents of that area by interrupting the normal flow of travel. For example, I used Fulmore Road to go to Kingstree from my farm. That is no longer possible. There are no other alternatives as short or convenient." R.23.

John Benson Rodgers, a sixty-five-year old man born and raised on the Fulmore Road, stated that as long as he has been alive, the Fulmore Road has been used and traveled by the public and maintained by the County. He personally witnessed the public use of the road and county maintenance for over 60 years. Additionally, he is responsible for Rodgers Cemetery on Fulmore Road which has been operated for longer than he has lived, and people have always traveled the Fulmore Road to obtain access to the cemetery. R.25.

Zell Gaskin was born and raised on Fulmore Road, and she confirmed that the road has always been open to and

used by the public. Her father also used the road and lived on the road, and he used it from approximately 1899 until he passed away. R.App. 1.

An additional witness, Margaret C. McAlister Lynch is a lifelong resident of the area and owns the 515 acre farm on both sides of the Fulmore Road adjacent to the RVA Trust Tract. She has owned the property since 1961 and states that the road has been used by the public for all of the years that she has owned it. She uses the road on a regular, almost daily basis, and she has personally witnessed the plowing and maintenance of the road by Williamsburg County since she has owned the property in 1961. R.20.

The County of Darlington experienced a similar situation to the one at hand in County of Darlington, at 572. In the Darlington case, the county brought an action against owners of a tract of land to determine the right of the public to use a recreational area known as Whipples Landing located on Louther's Lake and a dirt road which connected the public road with the landing area. The Darlington Court found evidence to support a finding that the public had acquired an easement in the road by implied dedication. Citing 23 Am. Jur. 2d *Dedication* § 19, the Court quoted "where acts of the owner justify the public authorities in believing the intention exists and they act on such belief, a dedication may be found to have occurred. . . . Such intention may be manifested by the owner's acquiescence in continuous use of the land by the public under the claim of the general public right. " Darlington at 576.

In the Darlington case, the parties stipulated that there were many members of the public who could testify that the road and "landing" in question had been used as a public road for approximately 75 to 80 years. The Darlington Court stated, "We are of the view, however, that the continuous and widespread public usage of the road for at least 50 years, without charge or interference from previous owners and these Landowners, clearly establishes the public character of the road." Darlington at 575.

The Appellant argues his failure to interfere with the public's usage of the road amounts to permissive use. Distinguishing an owner's acquiescence in long public use of his land rising to the level of an intent to dedicate from an owner's permissive allowance of the public using his private land requires an in depth factual examination. Acquiescence is defined as " . . . Passive compliance or satisfaction; distinguished from avowed consent on the one hand, and, on the other, from opposition or open discontent. Conduct from which assent may be reasonably inferred." Black's Law Dictionary 6th ed. 16 (1991). Black's Dictionary goes further to distinguish acquiescence from laches by making the following distinction: "'Acquiescence' relates to inaction during performance of an act while 'laches' relates to delay after act is done." Id. (emphasis added).

In the present circumstance, no question exists that prior to the Appellant's instigating the present action, no charge or interference from any use of the public of the Fulmore Road traversing the RVA Tract has ever been performed. Based upon the sworn testimony of the various concerned landowners and members of the public outlined above, the denotation as a public county road on county maps, state highway maps, on an old plat, and extensive long term public usage of this property shows clear and convincing evidence of dedication to the public by implied unequivocal consent.

2. The Owner acquiesced to extensive long term public maintenance from which intent to dedicate is implied.

In the present case, the Appellant makes much of Williamsburg County's notoriety of improperly maintaining private roads. The premise for all litigation concerning Williamsburg County's improper maintenance of private roads is based upon private landowner's requests that the County use its equipment or manpower to service private

roads. In the situation at hand, the Appellant does not argue that he requested any public service for a private purpose. The flaw in his argument is that he seeks to privately benefit and penalize the public from the allegedly illegal maintenance that the County has been performing on his land with his full knowledge. R.62, line 25 –R.63, line 8, lines 22-23. The case at hand is remarkably on point with the County of Darlington case, and the Appellant seeks to distinguish the present case by the proposition that "any public maintenance by Williamsburg County was illegal and does not reflect an implied intent to dedicate or any acceptance of such an implied dedication." Appellant's Initial Brief p. 10. The Appellant cites the County's Memorandum of Law submitted in the case of King v. Poston which stated that "the prior conduct of the county in plowing the road in question has no precedential or persuasive value in determining whether the road is public or private." However, this statement goes to the question of public acceptance of the dedication of the road, not to the intent to dedicate.

A careful examination of the County's litigious past with regard to road maintenance reveals that the County had in the past accepted roads intended to be dedicated for public maintenance for public maintenance that should not have been accepted. King v. Poston, 98-UP-435 S.C. Ct.App. 10/19/98, propounded by Appellant as controlling, involved a private landowner who was upset because he wanted the County to continue maintaining a road the landowner claimed had been dedicated to public use; however, the County would no longer accept it due to the failure of a public purpose in maintaining what to the County was an obviously private road. The Court's finding that Williamsburg "County's maintenance of Stewart Road over the years before the Circuit Court orders were issued is not sufficient to establish the public character of the vicinity such that the area could be considered 'improved.' [because] The testimony of the witnesses and the orders themselves

indicate Williamsburg County routinely maintained private roadways for the accommodation of landowners." King v. Poston, 98-UP-435.

The County's position is that it acted in good faith in full accordance with the Order of the Honorable Johnathan Z. McCowan issued on October 22, 1984, Case No.: 84-CP-45-321. Section 2(c) of this Order allows the County to maintain roads which have been in continuous use for more than twenty years without any written documentation as long as there was no question or controversy surrounding the road in question. R.111-R.118.

The facts indicate that the Appellant did not request public maintenance of his allegedly private road. There is no evidence in the record that Williamsburg County maintained this allegedly private road on the request of any private landowners situate along the road. The evidence is also clear that not only did the Appellant have knowledge that someone was maintaining his allegedly private road; but also, that he personally witnessed Williamsburg County maintaining his road. R.62, line 25 – R. 63, line 8. This conduct rises to the level of acquiescence in the dedication of this road to the public. At the very least, this conduct rises to the level of unclean hands in sitting back, watching and allowing the public to use and the County to maintain a private road every four to six weeks for well in excess of twenty (20) years, and then to claim that the maintenance was illegal.

The Fulmore Road received public maintenance from the County because it was widely used by the public. R.19, R.20, R. 21, R.23, R.24, R.25, R.App. 1, R. 97, lines 9-15 (the County employee who actually performed the work on a monthly basis). The County did not obtain any further written documentation regarding a perpetual easement of the Fulmore Road because prior to this litigation, there was never any questions raised by anyone as to the public nature of this road. Evidence in the record exists showing that for the past sixty years, the County has plowed and scraped the Fulmore Road. R.25. In the past twenty years, the County

installed drainage pipes under Fulmore Road in at least two locations, has cut bushes on the road, has repaired the road and has maintained the road almost monthly by scraping it and hauling dirt to repair the road. R. 27, R. 81, line 11 – R.82, line 23, R. 87, line 4 – R. 88, line 20; R. 53, line 10 – R. 54, line 3, R. 55, lines 1-4.

B. The County accepted Fulmore Road as a public road.

In order to perfect dedication, there must be an express or implied acceptance of a dedication before it is complete. "No formal acceptance is necessary to constitute a valid dedication." Boyd v. Hyatt, 294 S.C. 360, 366, 364 S.E.2d 478, 481 (Ct.App. 1988). The acceptance must also be made within a reasonable time. Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992). Acceptance by the public of the property dedicated may be implied by the public's continuous usage of the property, Id., and "the sufficiency of the use depends on the circumstances of each case." Boyd at 366, 481. In the Helsel case, they found acceptance of the offer of dedication through a public authority's using, repairing or working the streets. Helsel at 27.

In the present case, the public and the County accepted the offer of dedication by travelling the Fulmore Road extensively for sixty years or more. R. 25. Other sworn Affidavits show public use in travelling the Fulmore Road for twenty or thirty years. This traffic includes school buses, members of the public, and visitors to the Rodgers Cemetery located on the Fulmore Road. R.19, R.25, R. 20. At no time over the past sixty or more years prior to this litigation did the Appellant assert to the public the private nature of the road by warning or challenging the public use of the road.

The Fulmore Road was accepted for dedication by the County's performing maintenance on the road through installing drainage pipes in the late 1970s, R. 87, lines 4-12, and scraping and hauling dirt to repair the road for in excess of sixty (60) years. R. 25, R. 19. Evidence in the record shows monthly maintenance of the road for in excess of 30 years. R. 53, lines 1-24, R.55, lines 1-4, R.56, line 22 – R.57, line 6; R. 25, R. 19.

Appellants make much of Williamsburg County's litigious past regarding illegal public maintenance. The County's history with regard to public maintenance of private roads is one factor to be considered in whether or not it accepted this road as a public or private road. See Tyler v. Guerry, 251 S.C. 120, 160 S.E.2d 889 (1968) (stating that "[t]he fact that the county road building authority assisted the landowners by supplying labor and equipment is not conclusive nor is the fact that the road may have been worked on occasionally controlling."). In Tyler v. Guerry, the public sought public dedication of a road and a recreational area known as Brown's Landing. The landowners in Tyler had worked with the County in obtaining labor and equipment and that the road had been worked occasionally. The Tyler Court stated "Certainly the action of the county has not been of such character that this section of road has become a part of the county system." Tyler at 127, 892. In the present case, the action of the county had risen to the level of the road being a part of the county and state highway system since 1966. R.17.

In an unpublished opinion issued by this Court in October, Plaintiffs sought desperately to have a road declared public so that they could obtain public maintenance of it by the Defendant Williamsburg County. King v. Poston, 98-UP-435 (Ct.App. Oct. 19, 1998). In that case, the County did not participate in the appeal and would not agree to publicly maintain the road due to its private nature. R.69, line 16 – R.70, line 16. In that opinion, the Court held that county maintenance of the road in question was not

sufficient to establish the public character of the vicinity. King at 8. "The testimony of witnesses and the orders themselves indicate Williamsburg County routinely maintained private roadways for the accommodation of landowners." Id. The King case involved a single lane unpaved road which served no public purpose. It had been used by the lessees of the hunting and farming rights to the private tract of land, however, an important distinction is that the original maintenance was at the request of the private landowner and the road had since been abandoned by the county. In the case at hand, no evidence exists that any such maintenance on the Fulmore Road was at the request of the Appellant herein – more importantly, it was maintained with his acquiescence and knowledge that members of the general public traversed the Fulmore Road on a daily basis. The Fulmore Road is distinguishable from the Stewart Road for a primary reason that the Stewart Road served no valid public purpose – the primary reason why Williamsburg County did not maintain the Stewart Road.

C. Assessment of taxes on the Fulmore Road does not preclude dedication and acceptance.

The Appellant further argues that because he has paid taxes on this land, it tends to prove no dedication. No question exists that evidence of assessment and payment of taxes on property claimed to have been dedicated to public use is admissible on the issue of whether there has been dedication and acceptance. Anderson v. Town of Hemingway, 269 S.C. 351, 237 S.E.2d 489 (1977). However, nonassessment or assessment of taxes on land is not conclusive on the issue of dedication and acceptance. Helsel v. City of North Myrtle Beach, 307 S.C. 24, 413 S.E.2d 821 (1992). The nonassessment or assessment of taxes on land may be considered in conjunction with other facts to show there has been a dedication and acceptance." Helsel at 28.

The County stipulated that as of 1967, 1.2 acres were removed from the tax assessment of the McAlister Estate tract, the other private tract on which the Fulmore Road traverses, representing a right-of-way for a public road across the McAlister Estate tract. R. 15. No taxes have been levied or paid upon the McAlister 1.2 acre portion by any owner of said tract since that time. Id. Furthermore, the County concedes that it has levied taxes on the entire 191.5 acre RVA Trust property. R.16.

The County Tax Assessor Lois Martin testified that where there is a public road going through a piece of private property, it is normally taken out of the property for tax purposes because the property owner will come and tell them. R.76, lines 5-13. She goes further to testify that "there are certain things in [her] office . . . that [she is] only allowed to do by the property owner requesting it." R.76, lines 19-21. The Appellant argues that this constitutes evidence disproving his intent to dedicate; however, Ms. Martin goes further to state that "Let me give you a for instance, and this falls in the same line. If you have given an easement to a power company . . . for a power line easement over your property, you are paid for that easement. You have a length and a width of that easement, and I don't pull that property out and put it at a lower rate without a written request from the property owner." R.76, line 23-R.77 line 5.

Due to the rural nature of this land, the de minimis amount of taxes involved, and the failure of the landowner to take any action for itself to request that it pay no taxes, the county argues that the remaining facts proving intention to dedicate outweigh the Appellant's argument based upon payment of taxes.

III. The County Obtained a Prescriptive Easement for Fulmore Road.

To establish a prescriptive easement, the County bears the burden of proving the following elements: 1) the public's continuous and uninterrupted use or enjoyment of the right to use and traverse the Fulmore Road for a period of twenty years; 2) the identity of the things enjoyed – the Fulmore Road; and 3) the use of the road must have been adverse or under a claim of right. Babb v. Harrison, 220 S.C. 20, 66 S.E.2d 547 (1951). As stated above, determining whether or not an easement exists is a question of fact in an action at law requiring this court review the record for any evidence supporting the trial judge's finding. Eldridge at 398.

A. The County's use was adverse and under claim of right.

Prescriptive easements can be established through use which is either adverse or under a claim of right. Revis v. Barrett, 321 S.C. 206, 467 S.E.2d 460 (Ct.App. 1996). Use under claim of right is non-permissive use. King v. Poston, 98-UP-435; Sanitary & Aseptic Package Co. v. Shealy, 205 S.C. 198, 31 S.E.2d 253 (1953) (finding a private prescriptive easement upon an individual mistakenly believing an alleyway was a public driveway).

The Appellants claim that issues as to whether "permissive" use can be "adverse" was resolved in this Court's decision in Morrow v. Dyches, 328 S.C. 522, 492 S.E.2d 420 (Ct.App. 1997). The Morrow case involved parties who were asserting a private prescriptive easement over an area adjacent to the Plaintiff's grocery store for parking. In this case, this Court's scope of review on the determination of whether an easement existed or not was whether there was any evidence supporting the trial judge's finding of no easement. Morrow at 526, 423. The Morrow Court stated that

> It could possibly be contended that Morrow's belief that he had a right-of-way was sufficient for a prescriptive easement pursuant to a "claim of right." However, the only evidence regarding Morrow's predecessor-in-interest was that Morrow "thought" Raymond Still had a right-of-way across the property. This evidence is insufficient to establish that Still had a belief amounting to a claim of right, and again tacking requires proof of sufficient use for predecessors in interest as well. . . . the [Morrows] have only owned the property since October 1992 . . . .

Morrow at 529, 424.

The present case is distinguishable from Morrow. The claim of right the Morrows claimed was based upon their predecessor in interest Mr. Still, as the Morrows had only owned the property since October of 1992, and tacking a claim of right requires proof of sufficient use for predecessors in interest as well. Id. Another important distinction is that the claim of right and adverse use being asserted here is by the public – not a private landowner. Although the Morrow case involved a parking lot for the Morrow's store, and the general public had parked there during town festivities, it was not asserted that there had been long term public usage and/or long term public maintenance – a public easement was not being asserted. Furthermore, there was no evidence that the Morrows had maintained or improved the parking lot themselves.

Just as in King v. Poston, 98-UP-435, a finding of hostility is inherent in the trial court's finding that the Plaintiff's use of the Fulmore Road was under claim of right. King at 4. The public and the County certainly believed that the Fulmore Road was a public road, and "use under a mistaken claim of right does not establish permissive use as a matter of law." King at 5 citing Delk v. Hill, 365 S.E.2d 218 (N.C.Ct.App. 1988).

The evidence of use that is adverse or hostile and under claim of right in the matter at hand upon which the trial judge relied is clear. The Fulmore Road has been listed on the state highway maps since 1966 and has continuously been used by the public for more than sixty (60) years. R. 17, R. 25. Evidence in the record reflects the public opinion that there was never a question as to the public nature of the Fulmore Road. The County has maintained this road by putting in drainage pipes, repairing the road, cutting ditches, some of which has been in the physical presence with the actual knowledge and acquiescence of the predecessors in title. R. 62, l. 25 – R.63, l. 8. Additionally, the road connects two undisputed public roads and has been used by the citizens of the county on a continuous daily basis for many years. R. 25, R.20, R. 23, R. 19, R.App.1.

The County employee who actually plowed and graded the Fulmore Road testified in his deposition that he had plowed the Fulmore Road approximately one per month since 1984. R. 84, lines 7-10. He further testified that about 17 or 18 years ago, in approximately 1978 or 1979, that he worked with the bridge crew who actually laid concrete pipe in two places on this road for a ditch and laid four joints of five foot pipe which was paid for by the county. R.87, lines 4-12. Over the 130 to 140 times Mr. Mosely testified that he had been plowing the road, he testified that no one ever interrupted him to stop plowing the road nor did they interrupt him or tell him to stop laying the pipe on the Fulmore Road, nor did they interrupt him or question him on the private nature of this road. R.96, line 9- R. 97 line 5.

Mr. Thomas Gause, a retired Williamsburg County employee worked as a bush cutter, then motorgrader, and then as Superintendent of Public Works from approximately 1965 to mid 1980s. R.51, line 17 – R.52, line 22. During that period he graded Fulmore road on an average of once a month. R.53, line 22 – R.54 line 10. Mr. Gause goes further to state that "That road was traveled when I was a boy [in the 1940's and 1950's] and it was maintained by the county.

From 1965 right on I know the road has been maintained and it has never has stopped being maintained." R.62, lines 3-6. When questioned about Mr. Askins' actions causing him to believe that Fulmore Road was a public road, he answered, "[W]hen we were maintaining the road or doing work on the road, Mr. Askins saw us working on the road. He saw what we were doing, and he never complained. If I didn't want the road worked on, I would have complained. " R.62, line 25 – R.63, line 8. He was questioned as to how often that [Mr. Askins' observation of county maintenance] would occur, and he stated "I have seen him several times. . . . they never had no complaints." R.63, lines 22-25.

B. The County's use had been continuous and uninterrupted for over twenty years and the identity of things enjoyed was proved.

The parties stipulated below that James Moseley, a County motorgrader operator, has scraped the Fulmore Road since approximately 1977, and installed a drainage pipe under Fulmore Road in 1978. R. 16. The Appellant conceded below that there was continued and uninterrupted use or enjoyment by the public of the Fulmore Road for more than twenty (20) years and that the identity of the thing enjoyed is proved.

IV. The Injunction prohibiting the Appellant from closing his road does not amount to a deprivation of private property without just compensation.

The County has disputed the closing of the Fulmore Road because the Fulmore Road is a public road by either the theory of public dedication or by the County's obtaining it through a public prescriptive easement. For these reasons, the injunction prohibiting the Appellant from closing his road does not amount to a deprivation of private property without just compensation.

CONCLUSION

The evidence in the record establishes that the Appellant through his acquiescence in the extensive long term public usage and extensive long term public maintenance dedicated the .7 mile portion of the RVA Tract known as a section of the Fulmore Road to the public. Evidence also exists in the record from which a finding could be made that in the alternative, Williamsburg County acquired a prescriptive easement in the .7 mile portion of the RVA Tract known as a portion of the Fulmore Road by adverse use under a claim of right for a continuous period in excess of twenty years. For these reasons, Williamsburg County prays that the decision of the lower court be affirmed.

Respectfully submitted,

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